



CORNELL
UNIVERSITY
LIBRARY



THIS BOOK IS ONE OF A
COLLECTION MADE BY

BENNO LOEWY

1854-1919

AND BEQUEATHED TO
CORNELL UNIVERSITY

Cornell University Library
UB856 .W79

Trial by a court martial of Lieut. Col.



3 1924 032 644 373

olin



Cornell University
Library

The original of this book is in
the Cornell University Library.

There are no known copyright restrictions in
the United States on the use of the text.

TRIAL
BY A COURT MARTIAL
OF
LIEUT. COL. GRENVILLE TEMPLE WINTHROP,
ON CHARGES PREFERRED AGAINST HIM BY
ADJUTANT GEN. WILLIAM H. SUMNER,
IN PURSUANCE OF ORDERS FROM
HIS EXCELLENCY LEVI LINCOLN,
GOVERNOR OF THE COMMONWEALTH OF MASSACHUSETTS.

PRINTED FOR THE RESPONDENT.



BOSTON:
PUBLISHED BY CARTER, HENDEE & CO.
1832.

the "infliction" has been wholly His Excellency's. Not even the Court, from whence one might more naturally have expected it, come in here for any share. Their sentence was light — lighter even than my own consciousness of having done my duty, had allowed me to anticipate. Why let us look at it a moment. Who was the aggrieved party? Why the State, in the person, and I may say, the heart of His Excellency. And who was the prosecuting officer? Why His Excellency in the person, and by the mouth of the Adjutant General. And who were the Court? Why individuals selected by the Adjutant General again, as representative of His Excellency. And who was the final Judge, from whose mouth this heated sentence has come forth? Why this was His Excellency in his own person.

So, turn which way I would, I still beheld the impending vengeance of the same aggrieved pride; and how could I less than consider my commission gone! I look back upon it as a marvel, that a mere reprimand should have been the issue, and I have almost dared to whisper to myself, that, had not the Court foreseen the ridicule which must have been heaped upon the Chair of State, and had they not taken pity upon the militia system, which might have lost the "sympathy of a kindred feeling" at head quarters, (had the case been otherwise decided,) they would have dismissed the whole charge as futile and unworthy.

The sting of the sentence, then, has not been in the law, nor in the judgment of the Court, nor in the conscience of the Respondent; but in the mouth of His Excellency — who, in discharging what he himself has termed, and what any "ingenious and sensitive mind" must esteem, the "delicate and truly

painful office of carrying into effect the sentence of the Court," in a case where he himself had been at once the aggrieved party, the primal accuser, and the final judge, has so "indulged in assumptions of personal vindication," as to take away from him entirely the shield of office, and leave him to the common responsibility of mankind.

But to conclude, I can only say, that on the occasion which gave rise to this vexatious business, (which has involved me in the loss of not less than three months' time, besides an actual outlay of more than one thousand dollars,) I acted conscientiously, and for the best. Now the thing is over, I can see, of course, as plainly as can His Excellency, how I might have avoided the evil; but let him and all remember, that the party concerned in any act, is the only one who can never judge by the event, and let them reflect how much of their wisdom has been gained from his experience.

Careat successibus opto,
Quisquis ab eventu facta notanda putat.

G. T. W.

Boston, September 1, 1832.

GENERAL COURT MARTIAL.

THE General Orders for convening the Court Martial, were first read by the Judge Advocate. A duplicate original is annexed, and is marked (1) as follows:—

(1)

COMMONWEALTH OF MASSACHUSETTS.

Head Quarters, Boston Feb. 6th, 1832.

GENERAL ORDERS.

A General Court Martial will be holden at the Old Common Council Room, in the Court House, in Court Square, in Boston, on Monday the fifth day of March next, at 11 o'clock, A. M. for the trial of Lieutenant Colonel Grenville Temple Winthrop, Commanding Officer of a Company of Infantry in the first Division, called the Independent Company of Cadets, upon the charges of disobedience of orders, neglect of duty, and unmilitary and unofficer like conduct, made and preferred against him by William H. Sumner, Adjutant General of the Commonwealth, as specified in his complaint dated the 30th day of January last.

Brigadier General William Peck of the 2d Brigade, 5th Division, is appointed President of the Court: Two Colonels and one Lieutenant Colonel from the 1st Division, and one Lieutenant Colonel from the 3d Division, will be detailed as Members. Reports of the members detailed will be forwarded to the Adjutant General's Office as soon as they are made.

Major Abraham Edwards, Brigade Quarter Master of the 1st Brigade 3d Division, is appointed Marshal of the Court.

Major Horace Mann, Judge Advocate of the 1st Division, will furnish the Respondent with copies of the Complaint ex-

hibited against him, and will give due notice to the Respondent, and all other persons interested, of the time and place of the sitting of the Court, and will himself attend the same and perform all the duties relating thereto, required of him by law. And after the proceedings of the Court are duly authenticated will forthwith forward the same, together with the Pay Roll of the Court, and the vouchers thereof, to the Adjutant General's Office.

The Major General of the 1st Division will order a Sergeant to attend the Court, who will report to the Marshal, and make such preparations for the reception of the Court at the place appointed as he shall direct.

By his Excellency's Command.

W. H. SUMNER, *Ad. Gen.*

Brigadier General William Peck, who was appointed President, appeared and took his seat. Colonel Thomas Davis, Colonel Charles Lane, and Lieutenant Colonel Luther Eaton, being called, severally appeared and took their seats. No Lieutenant Colonel from the 3d Division appeared.

The Judge Advocate administered to the President, and to each of the Members, singly, the oath required by the 31st Section of the Law of March 6th, 1810.

The President administered to the Judge Advocate, the oath prescribed by the same Section, of the same statute.

The Marshal, Major Abraham Edwards, being present, by order of the President, opened the Court.

Brigadier General William H. Sumner, the Complainant, was called and answered.

Lieutenant Colonel Grenville Temple Winthrop, was called and answered.

Lieutenant Col. Winthrop being asked if he had any challenge to make to any member of the Court, answered that he had not.

The Judge Advocate read the charges and specifications of charge, with his certificate thereon, that they were a true copy, and the return of H. H. Huggefurd, a deputy of the Sheriff of the County of Suffolk, that he had delivered a true and attested copy thereof, to the said Lieut. Col Winthrop; all which are annexed, and are marked (2) as follows:—

(2)

Adjutant General's Office, Boston, January 30th, 1832.

To HIS EXCELLENCY LEVI LINCOLN,
Governor and Commander in Chief
of the Commonwealth of Massachusetts.

William H. Sumner, Adjutant General of said Commonwealth, respectfully reports to your Excellency, that, in obedience to the General Orders of the 4th of January, instant, Grenville T. Winthrop, Esq. Captain, with the rank of Lieutenant Colonel, of a company of infantry, belonging to the 1st division of the militia, called the Independent Company of Cadets, was arrested, and now as his duty requires in obedience to said orders, and your further instructions, the said William H. Sumner, Adjutant General as aforesaid, respectfully complains to your Excellency of the conduct of said Lieutenant Colonel Grenville T. Winthrop, as commanding officer of the company aforesaid, on the 4th day of January aforesaid, and prays that a Court Martial may be ordered for the trial of the said Lieutenant Colonel Grenville T. Winthrop, upon the following charges.

CHARGE I.

I S T. — D I S O B E D I E N C E O F O R D E R S .

Specification 1st. For that a General Order dated the 24th day of December last past, was duly issued and transmitted to Grenville T. Winthrop, Esq. Captain, with the rank of Lieutenant Colonel of a company of infantry belonging to the 1st division of the militia, called the Independent Company of Cadets, by which the said company then being under the command of the said Lieutenant Colonel Winthrop, as aforesaid, was ordered to perform escort duties for the Government on the day of General Election, on the 4th day of January then next, and was therein directed to repair to the State House, at noon, of the last mentioned day, and report to His Excellency the Commander in Chief for further orders. Now your complainant avers, that after the organization of the two branches of the Legislature on said 4th day of January, a procession consisting of the Executive and Legislative branches of the Government and their officers, was formed at the State House for the purpose of attending public worship at the Old South meeting-house, in the city of Boston, the customary place therefor, and returning thereafter to the said State House, as is usual and customary upon days of General Election, and

that the said Lieutenant Colonel Grenville T. Winthrop, commanding officer of the company aforesaid, having on that day at the State House aforesaid, reported to His Excellency, that the company under his command aforesaid was present, and ready to perform the escort duties to the Government, as in the General Orders aforesaid directed, was, after the procession was so formed, on that day ordered, then to take up the escort thereof, and having so done, he conducted the same to the meeting-house, aforesaid, and having delivered the said procession at the door of said meeting-house, and while the Government aforesaid were in the same for the purpose of attending divine service, as aforesaid, he, the said Lieutenant Colonel Grenville T. Winthrop, with the company aforesaid under his command, departed therefrom, and did not return and escort the procession back to the said State House in the usual and customary manner, and so in disrespect to the Government aforesaid, at Boston aforesaid, and on the day last mentioned, he the said Lieutenant Colonel Grenville T. Winthrop, disobeyed said orders.

Specification 2d. For that a General Order dated the 24th day of December, last past, was duly issued and transmitted to Grenville T. Winthrop, Esq. Captain, with the rank of Lieutenant Colonel of a company of infantry belonging to the 1st division of the militia, called the Independent Company of Cadets, by which the said company was ordered to perform escort duties for the Government of the Commonwealth on the day of General Election on the 4th day of January then next, and to repair to the State House at noon of the last mentioned day, and report to His Excellency the Commander in Chief for further orders. . Now your complainant avers, that after the organization of the two branches of the Legislature on the said 4th day of January, a procession consisting of the Executive and Legislative branches of the Government and their officers, was formed at the State House for the purpose of attending public worship at the Old South meeting-house in the city of Boston, the customary place therefor, and returning thereafter to the said State House, as is usual and customary upon days of General Election and that the said Lieutenant Colonel Grenville T. Winthrop, commanding officer of the company aforesaid, having on that day, at the State House aforesaid, reported to His Excellency that the company under his command aforesaid, was present and ready to perform the escort duties to the Government as directed in

the General Orders aforesaid, was, after the procession was so formed, on that day, ordered there to take up the escort thereof, and having so done he conducted the same to the meeting-house aforesaid, and was then and there ordered to report with his company for escort duty after half an hour, yet the said Lieutenant Colonel Grenville T. Winthrop did not report himself at the meeting-house aforesaid with his company for escort duty at the expiration of said half hour, nor was he there with his company at that time, nor at any time thereafter ready and prepared to take up the escort of the Government aforesaid until the members thereof had left the meeting-house, and did not escort the same back to the State House, as is usual and customary on similar occasions, and so at Boston aforesaid, on the 4th day of January aforesaid, the said Lieutenant Colonel Grenville T. Winthrop in disrespect and contempt of the authority of the Government, knowingly and intentionally disobeyed said order.

Specification 3d. For that the said Lieutenant Colonel Grenville T. Winthrop, commanding officer of the Independent Company of Cadets, as aforesaid, being under orders, as set forth in the general order of the 24th December last, referred to in the 1st Specification of the first charge of this complaint, and having reported himself at the State House to His Excellency, in obedience thereto for further orders, was then and there directed and ordered in performance of the duties required of him by the General Order aforesaid, to take up the escort of the procession, which was then and there formed in the manner and for the purposes set forth in said specification; and the said Lieutenant Colonel Grenville T. Winthrop, commanding officer as aforesaid, did so take up the escort, and conduct the procession to the Old South Meeting House, where the Government usually attend worship on Election days, and having there delivered the procession, he, the said Lieutenant Colonel Grenville T. Winthrop, commanding officer as aforesaid, while he was on the march with his said company away from the said Meeting House without leave, and while he was in Milk street near thereto, received an order from the Commander in Chief through his, the said Lieutenant Colonel Grenville T. Winthrop's Adjutant, Captain Sargent, to whom the same was communicated by Lieutenant Colonel Quincy, Aid de Camp to the Commander in Chief, who was sent after him, the said Lieutenant Colonel Winthrop, for that special purpose, to report himself at the church in half an hour. Now

your complainant avers, that the said Lieutenant Colonel Grenville T. Winthrop did not return to the church with the company under his command, and report himself in half an hour, as so ordered, but departed therefrom, while the Government aforesaid were engaged in public worship, and did not return thereto, and was not ready and prepared to take up the escort of the procession back to the State House, when the same was ready to proceed, and did not so take up the escort and perform the duties required of him in that behalf, by the orders aforesaid; but left the procession to disperse or return to said State House without any escort; and so the said Lieutenant Colonel Grenville T. Winthrop, at Boston aforesaid, on the 4th day of January, aforesaid, in disrespect to the Commander in Chief, and the authority of the Government of the Commonwealth, and the members of the Government thereof, which were assembled on that occasion, disobeyed said orders.

CHARGE II.

NEGLECT OF DUTY.

Specification 1st. For that a General Order dated the 24th day of December last was duly issued and transmitted to Grenville T. Winthrop, Esq. Captain, with the rank of Lieutenant Colonel, of a Company of Infantry belonging to the first Division of the Militia, called the Independent Company of Cadets, by which the said Company was ordered to perform Escort duties for the Government on the day of General Election, on the 4th day of January then next, and was therein directed to repair to the State House at noon of the last mentioned day, and report to His Excellency the Commander in Chief for further orders. Now your complainant avers, that after the organization of the two branches of the Legislature on said 4th day of January, a procession consisting of the Executive and Legislative branches of the Government, and their officers, was formed at the State House, for the purpose of attending public worship at the Old South Meeting House, in the city of Boston, the customary place therefor, and returning thereafter to the said State House, as is usual and customary on the days of General Election, and that the said Lieutenant Colonel Grenville T. Winthrop, commanding officer of the company aforesaid, having on the last mentioned day at the State House aforesaid, reported to his Excellency, as, in the general order aforesaid directed, was, after the pro-

cession was so formed on that day ordered to take up the escort thereof, by which it became the duty of the said Lieutenant Colonel Grenville T. Winthrop, commanding officer aforesaid, with the Company under his command as aforesaid, to escort the Government of the Commonwealth so formed in procession as aforesaid to the Meeting House aforesaid, and there with his Company to have waited until the public services of the Church were over, and then to have taken up the escort again with the usual and customary honors, and to have conducted the same to the State House, and there to have waited until he was discharged from further duty, or received further orders; of all which the said Lieutenant Colonel Grenville T. Winthrop was conusant, yet the said Lieutenant Colonel Grenville T. Winthrop, commanding officer as aforesaid, having delivered the procession at the door of the Meeting House aforesaid, without leave departed therefrom, and was not present thereat when the ceremonies of the Church were over, to take up the escort as aforesaid, and although proclamation was publicly made by the Sheriff in the Meeting House after the services were closed, that the procession would again be formed and conducted back to the State House in the order and manner in which it came, he, the said Lieutenant Colonel Grenville T. Winthrop did not receive the procession with the Company under his command with the usual and customary honors at the door of the Meeting House aforesaid, nor escort the same to the State House in the order and manner in which it came, as it was his duty to have done, but left the said procession to return to said State House without any Escort; and so at Boston aforesaid on the fourth day of January aforesaid, he, the said Lieutenant Colonel Grenville T. Winthrop, knowingly and intentionally, wholly neglected his duty in that respect.

Specification 2d. For that a General Order, dated the 24th day of December last, was duly issued and transmitted to Grenville T. Winthrop, Esq. Captain, with the rank of Lieutenant Colonel, of a company of Infantry, belonging to the first Division of the Militia called the Independent Company of Cadets, by which the said company was ordered to perform Escort duties for the Government on the day of General Election, on the 4th day of January then next, and was therein directed to repair to the State House at noon of the last mentioned day, and report to his Excellency the Commander in Chief for further orders. Now your complainant avers, that after the organization of the two branches of the Legislature on

said 4th day of January, a procession consisting of the Executive and Legislative branches of the Government, and their officers, was formed at the State House for the purpose of attending public worship at the Old South Meeting House in the city of Boston, the customary place therefor, and returning thereafter to the said State House, as is usual and customary on days of General Election, and that the said Lieutenant Colonel Grenville T. Winthrop, commanding officer of the company aforesaid, having on the said 4th day of January, at the State House, reported to His Excellency, that the company under his command aforesaid was present and ready to perform the Escort duties to the Government, as in the General Orders aforesaid directed, was, after the procession was so formed on that day, ordered to take up the Escort thereof, and having so done, he conducted the same to the Old South Meeting House, and was then and there further ordered to be ready with his company to report himself for Escort duty *after half an hour*, whereby it became the duty of the said Lieutenant Colonel Grenville T. Winthrop, commanding officer as aforesaid, to have been present at the Meeting House aforesaid, with the company under his command, at the expiration of said half hour and reported, and there, unless other orders were given, to have waited until the services of the Church were over, and the procession of the Civil Government was formed, and to have received the same at the door of the said Meeting House, with the usual and customary honors, and to have conducted the same to the State House, and there to have delivered the same in a military manner. Yet the said Lieutenant Colonel Grenville T. Winthrop without leave marched off with his company from the Meeting House aforesaid, and afterwards returned with the same before the public services of the Church were concluded, and without reporting and without leave soon marched away again, and was not present to receive an order which was sent to him to take up the Escort of the procession at the door of the Meeting House after the services were over, and did not receive the procession when it was ready to move, nor escort the same back to the State House; and so at Boston aforesaid on said 4th day of January, in disrespect to the Government aforesaid, the said Lieutenant Colonel Grenville T. Winthrop knowingly and intentionally neglected his duty.

Specification 3d. For that a General Order dated the 24th day of December last was duly issued and transmitted to Grenville T. Winthrop, Esq. Captain, with the rank of Lieu-

tenant Colonel of a Company of Infantry belonging to the first Division of the Militia called the Independent Company of Cadets, by which the said company was ordered to perform Escort duties for the Government on the day of General Election, on the 4th day of January, then next, and was therein directed to repair to the State House, at noon of the last mentioned day, and report to His Excellency the Commander in Chief for further orders. Now your complainant avers, that a procession, consisting of the Executive and Legislative branches of the Government and their officers, was formed at the State House on the said 4th day of January for the purpose of attending public worship at the Old South Meeting House in the city of Boston the customary place therefor, and returning thereafter to the said State House, as is usual and customary after the organization of the two branches of the Legislature on the day of General Election, and was, after the procession was so formed on that day, ordered to take up the Escort thereof; and having so done he conducted the same to the Old South Meeting House, and was there further ordered to be ready with his company to report himself for escort duty *in half an hour*; whereby it became the duty of the said Grenville T. Winthrop, commanding officer as aforesaid, to have been present at the Meeting House aforesaid, with the company under his command in half an hour, and reported, and there, unless other orders were given, to have waited until the services of the Church were over, and the procession of the Civil Government was formed, and then to have received the same at the door of the said Meeting House with the usual and customary honors, and to have conducted the same to the State House aforesaid, and there to have delivered the same in a military manner; yet the said Lieutenant Colonel Grenville T. Winthrop without leave marched off with his company from the Meeting House aforesaid, and afterwards returned with the same, before the public services of the Church were concluded, and without reporting, and without leave, soon marched away again, and was not present to receive an order which was sent to him to take up the Escort of the procession at the door of the Meeting House after the public services thereof were over, and did not receive the procession when it was ready to move, nor escort the same back to the State House; and so at Boston aforesaid on said 4th day of January, in disrespect to the Government aforesaid, the said Lieutenant Colonel Grenville T. Winthrop knowingly and intentionally neglected his duty.

CHARGE III.

UNMILITARY AND UNOFFICERLIKE CONDUCT.

Specification 1st. For that a General Order dated the 24th of December last, was duly issued and transmitted to Grenville T. Winthrop, Esq. Captain, with the rank of Lieutenant Colonel of a company of infantry belonging to the 1st division of the militia, called the Independent Company of Cadets, by which the said company was ordered to perform Escort duties to the Government on the day of General Election, on the 4th day of January then next, and was therein directed to repair to the State House, at noon, of the last mentioned day, and report to his Excellency the Commander in Chief, for further orders. Now your complainant avers, that the said Lieutenant Colonel Grenville T. Winthrop, with the said company under his command, did report himself at the said State House in obedience to the General Orders aforesaid, and for the purposes in said Order mentioned, and for further orders in relation thereto, on the 4th day of January, instant, and did, in obedience to the further orders he then and there received, take up the Escort of the Government, which was formed in procession at said State House for the purpose of going to the Old South meeting-house, in the city of Boston, to attend public worship, as is usual and customary on days of General Election, and of returning thereafter to said State House; of all which the said Lieutenant Colonel Grenville T. Winthrop was conscious, and did conduct and escort the same to said meeting-house, and there deliver the same for the purpose aforesaid; and the said Lieutenant Colonel Grenville T. Winthrop after said procession had entered said meeting-house, without leave, or authority so to do, gave orders to his company to march away from the meeting-house aforesaid, and did actually march away therefrom with his said company, and while on the actual march away, from said meeting-house with his said company in Milk-street, he, the said Lieutenant Colonel Grenville T. Winthrop received another order from his Excellency the Commander in Chief, to report himself at the meeting-house aforesaid with his company for escort duty, *after half an hour*, and having thereafter continued his march away from the meeting-house aforesaid, he there afterwards returned during the continuance of the public services, and halting a short time before the said meeting-house, but without reporting, or receiving permission to go away, or leaving behind him an

officer to give information where he intended to go, so that an order could be communicated to him, and while the members of the Government aforesaid were engaged in public worship, marched off again with his said company through several streets in the city, and after again returning and halting a short time before the said meeting-house, but, without reporting or receiving permission so to do, and without leaving behind him an officer to give information where he intended to go, so that an order could be communicated to him, marched off again with his said company, and did not return in season to take up the Escort of the procession of the Government with the usual and customary honors, and was not present to receive an order which was given, and directed to be communicated to him for that purpose when the services of the meeting-house were closed; by reason of all which, the Commander in Chief and other members of the procession left the meeting house aforesaid, without being received and saluted at the door of said meeting house, and escorted back to the State House with the form and ceremony which is customary and suited to the occasion; all which conduct on the part of the said Lieutenant Colonel Grenville T. Winthrop is unmilitary and unofficerlike, and contrary to the rules of military etiquette and propriety, and unbecoming an officer of his rank and station.

Specification 2d. For that the said Lieutenant Colonel Grenville T. Winthrop, commanding officer at Boston aforesaid, on the said 4th day of January, instant, being under orders of the 24th of December, as aforesaid, for the purposes in said order mentioned, and having reported, and taken up the Escort of the Government for the purpose of going to the Old South meeting-house to attend public worship, and returning thereafter to the State House, as set forth in the last specification, and having delivered the procession aforesaid at the meeting-house aforesaid, he, the said Lieutenant Colonel Grenville T. Winthrop there received an order from the Commander in Chief to be ready with his company, and report for Escort duty after half an hour; and having neglected being in readiness at that time with his company to take up the procession at the door of the meeting-house, in order to conduct the same back to the State House, in the usual and customary manner of which he was consultant, and not having in fact returned to the said meeting-house for so doing, until some time after the public services were over, and most of the members of the Government which composed

the procession aforesaid, had left the meeting-house, and had dispersed, and the Governor, and a part of the members of the Executive Council, and some few other members of the Civil Government of the State had proceeded some way returning in their usual course on such occasions towards the State House, the said Lieutenant Colonel Grenville T. Winthrop then, and there with the company under his command, in a disorderly and unmilitary manner, ran through the streets with a view to intercept the Governor and Commander in Chief, and other members of the Executive Council and Civil Government, who were with him on their way to the State House aforesaid, and did actually intercept him and them in their course to the State House aforesaid, in the public highway, near Park-street meeting-house, in said Boston, and without making any explanation, or offering any apology, for his previous neglect in not taking up the Escort at the said meeting-house, and without requesting permission then to take up the same, did in an unmilitary and unofficerlike manner, order his company in front of the Commander in Chief and other members of the Government aforesaid who accompanied him, which said company in obedience to said order, attempted to form in front of his Excellency, and the other members of the Government who were with him, and thereby impeded them and obliged them to change their course from one part of the street to another, in order to return to the said State House; all of which conduct on the part of the said Lieutenant Colonel Grenville T. Winthrop, was unmilitary, unofficerlike, and highly disrespectful to the Commander in Chief, and other members of the Government who accompanied him, and had a tendency to bring the militia into ridicule, and the military forms and ceremonies of the Government on the day of General Election into contempt.

Specification 3d. For that the said Lieutenant Colonel Grenville T. Winthrop, commanding officer, as aforesaid, at Boston, aforesaid, on the said 4th day of January, instant, being under the orders of the 24th December, as aforesaid, for the purposes therein named, and having reported in obedience thereto, and taken up the Escort to the Government, as he was thereupon ordered, and conducted the procession thereof, to the Old South meeting house, for the purpose of attending public worship, and having departed therefrom, and neglected to return in due season, to receive the said procession at the door of the said meeting house, and conduct the same back to the

State House, and after the members which composed said procession had left the said meeting house, having intercepted and impeded the Commander in Chief and the members of the Government who accompanied him on their return to the State House, in the street near Park Street meeting house, as in the 1st and 2d Specifications of the 3d Charge is set forth, he, the said Lieutenant Colonel Grenville T. Winthrop, then and there, while in said street, so intercepting and impeding the Commander in Chief and other members of the Government who accompanied him, was informed and ordered by command of his Excellency, that his Excellency the Commander in Chief had no further orders for him; yet, the said Lieutenant Colonel Grenville T. Winthrop, after receiving the order last aforesaid, and after the Commander in Chief and other members of the Government who accompanied him as aforesaid, had passed by the said company, under the said Lieutenant Colonel Winthrop's command, marched his said company up Park street, closely following in rear of the Commander in Chief to the State House, and there formed his company in line, in the same way and manner as he should have done if he had not been dismissed from duty; and then, without making any explanation or offering any apology for his disrespect and neglect, as aforesaid, or even asking permission so to do, but on the contrary, in contempt of the order of his Excellency last given, as aforesaid, sent his Adjutant up to his Excellency, in the Council Chamber, to report for further orders; all of which conduct on the part of the said Lieutenant Colonel Grenville T. Winthrop, was highly unmilitary and disrespectful, and subversive of good order and discipline.

All which is respectfully submitted.

W. H. SUMNER, *Adjutant General.*

Boston, Feb. 8th, 1832. — I hereby certify, that the above charges and specifications are a true copy of the original, transmitted to me by virtue of general orders, under date of the 6th instant, from William H. Sumner, Adjutant General of the Commonwealth of Massachusetts.

HORACE MANN, *Judge Advocate,*
1st Div. Mass. Militia.

A true Copy, Attest,
H. H. HUGGEFORD,
Deputy Sheriff.

'Suffolk. ss. Boston, 9th February, 1832. I have this day served the within presents, on the within named Grenville Temple Winthrop, Lieutenant Colonel of the Independent Company of Cadets, by rank, and Captain of said company, by delivering to him, in hand, an attested copy of the within charges and specifications, together with an attested copy of the within notice from Horace Mann, Esq., Judge Advocate of 1st Division of Massachusetts Militia.

H. H. HUGGEFORD,
Deputy Sheriff.'

<i>Fees — Service,</i>	30
Travel,	04
Copy,	5 00
	<hr/>
	\$5 34.

The Judge Advocate asked the Respondent, whether he was guilty or not guilty of the matters of charge, — to which he answered, that he was not guilty.

And the Court adjourned to meet on Tuesday morning next, at 10 o'clock.

TUESDAY MARCH, 6th, 1832.

The court met pursuant to adjournment.

Present. Brig. Gen. William Peck, President. — Col. Thomas Davis; Col. Charles Lane; Lieut. Col. Luther Eaton.

The Respondent was called, and answered.

The Complainant was called, and answered.

Lieut. Col. Abijah Ellis, of the 3rd Division, detailed to sit as a member of this Court Martial, laid his commission and orders of detail, on the table.

Lieut. Col. Winthrop being asked, whether he had any objection to Lieut. Col. Ellis's taking his seat, as a member of this Court, in consequence of his non-appearance on the first day, expressly waived all exceptions on that account.

Lieut. Col. Abijah Ellis was then sworn as the other members of the court had been, and took his seat.

The charges and specifications of charge, contained in the document marked (2) with the certificates thereto annexed, were then again read by the Judge Advocate.

The proceedings of yesterday were read. The Judge Advocate introduced and read the order of arrest, with the certifi-

cate of Lieut. Col. Josiah Quincy, Jr. thereto annexed, which is marked (3) as follows:—

(3)

COMMONWEALTH OF MASSACHUSETTS.

Head Quarters, Boston, Jan. 4, 1832.

GENERAL ORDER.

His Excellency, the Commander in Chief, orders that Lieut. Col. Grenville T. Winthrop, commanding officer of the Independent company of Cadets, be put under arrest for disobedience of orders and neglect of duty in the performance of the Escort duties to the Government of the Commonwealth this day.

Lieut. Col. Josiah Quincy, Jr. will execute this order, by delivering a copy to the said Lieut. Col. Grenville T. Winthrop, in person, or by leaving a copy thereof at his Quarters.

The Adjutant General will file the necessary charges and specifications of charge upon which the said Lieut. Colonel Grenville T. Winthrop will be tried, and present the same to the Commander in Chief for his further consideration and direction.

The command of the Independent Company of Cadets, during the arrest of Lieut. Col. Winthrop, devolves on Major Henderson Inches, Jr.

By his Excellency's Command,

W. H. SUMNER, *Ad. Gen.*

A true copy — Attest.

JOSIAH QUINCY, Jr.,

Aid de Camp, &c, &c.

Boston, January, 4th, 1832. In pursuance of the within order I left an attested copy of the same at the Quarters of Lieut. Col. Winthrop.

Attest,

JOSIAH QUINCY, Jr.

Aid de Camp, &c, &c, &c.

Col. Quincy was called by the complainant and sworn, and verified said signature, and the facts stated in his return.

The Judge Advocate moved audience of evidence to sustain the complaint, and that the evidence adduced in support of the first specification under the first charge, might be applied to all the charges and specifications; and the Court granted said motion.

Major Aaron Davis Capen was called by complainant and sworn.

1. *Question by Judge Advocate.* What office do you hold in the Militia?

Answer. I am Senior aid-de-camp to the Major General of the First Division Mass. Militia, and orderly officer of the Division.

2. *Question by same.* Did you transmit an order to the Captain of the Independent Company of Cadets, requiring him to perform Escort duty on the last Election day, with said Company?

Here the Judge Advocate read and exhibited to Major Capen, the paper marked (4) which is as follows :—

(4)

COMMONWEALTH OF MASSACHUSETTS.

Head Quarters, Boston, Dec. 24th, 1831.

GENERAL ORDERS.

Major General Aaron Capen, will order the Independent Company of Cadets to perform the escort duties for the Government on the day of General Election, which, by the amendment of the constitution, will take place on Wednesday the 4th day of January next. The company will repair to the State House at noon, and report to his Excellency, the Commander in Chief, for further orders.

The Major General will also direct a Salute of Artillery to be fired on that day, after the Government shall be organized.

The Adjutant General and acting Quarter Master General, will make the requisite provisions for the day, and give such further Instructions as occasion shall require, to the officer detailed for the command of the Artillery, who will report to him for that purpose.

By his Excellency's command,

W. H. SUMNER, *Ad. Gen.*

First Division, Dorchester, Dec. 30th, 1832. Lieut. Col. Grenville Temple Winthrop, of the I. C. Cadets, will comply with the direction contained in the above general order.

By order of Major General Capen.

AARON DAVIS CAPEN, *Aid de Camp.*

and the witness being about to answer, the Respondent submitted a motion, numbered (5) as follows :—

(5)

The Respondent excepts to the General Order of the 24th Dec. 1831, now produced in evidence, and to all subsequent orders and proceedings founded thereon, upon the ground that the said General Order of 24th Dec. 1831, was in no respect binding upon the Respondent or upon the corps under his command by the laws of the land, and that the subsequent orders and proceedings founded thereon, were equally without force of lawful authority, and in no respect obligatory upon the Respondent or his company; and that whatsoever was done by the Respondent and by those under his command, in consequence of the said orders, and pursuant thereto, was voluntarily done out of courtesy and respect to His Excellency the commander in chief; and protesting that the service required by said orders was in no respect willingly and intentionally slighted by the Respondent; that every suggestion contained in the charges preferred against him before this Hon. Court of disrespect and contempt of the government of this Commonwealth, and of the orders and authority of His Excellency, the commander in chief, is wholly unfounded and untrue; and denying the whole substantial matter of the said charges in manner and form as stated in the specifications thereof, the Respondent prays the judgment of this Hon. Court whether the said General Orders of 24th Dec. 1831, and any subsequent orders and proceedings founded thereon, were obligatory upon the Respondent and the company under his command? and whether if the service rendered in conformity to those orders was, as he respectfully insists, a voluntary service rendered out of courtesy and respect, it is competent for this Hon. Court to hold him amenable to Martial Law for any imperfection in its performance, arising, as he insists, from circumstances beyond his control?

And that the Hon. Court may be the better enabled to judge of the sufficiency of the exception aforesaid, the Respondent respectfully suggests his views of the law, as he is advised, relative to the said orders and the proceedings founded thereon.

The said General Order, dated on the 24th day of December last, commands the Independent Company of Cadets, whereof the Respondent was then the commanding officer, to perform Escort duties for the government on the day of General Election, being the fourth day of January then next, and directs the Respondent to repair to the State House at noon of that day and there report for further orders. And the Respondent denies that his Excellency the commander in chief has any

authority by the constitution and laws of this Commonwealth, to issue an order for escort duty to any corps of militia not in actual service.

The foundation of all military authority in the government is the will of the people, as expressed and declared in their written constitution and laws. Whatever power they have delegated to any officer of the government is there only to be found ; and whatever they have not expressly delegated to any particular officer resides in the commonwealth, represented by its chief executive and legislative officers collectively taken, and expressing its voice by a public law.

By the constitution of this Commonwealth (Chap. 2, Sec. 7,) the Governor is declared to be the commander in chief of the Army and Navy and of all the Military forces of the Commonwealth, with full power to *train, instruct, exercise and govern* the militia ; and *for the special defence and safety of the Commonwealth to assemble them* in martial array ; and to use and exercise over the Army and Navy and over the militia in actual service, the law martial in time of war, or invasion, and also in time of rebellion declared by the Legislature to exist, *as occasion shall necessarily require* ; and he is expressly entrusted with these and *other powers incident* to the offices of captain general and commander in chief, *to be exercised agreeably to the rules and regulations of the constitution and the laws of the land, and not otherwise.*

The power of military command conferred upon the Governor by this section of the constitution is of a limited character. The right of requiring an escort from the militia in time of peace, not being expressed in the constitution, cannot be inferred from it, unless it be implied as among the powers incident to the offices of captain general and commander in chief. But the whole spirit and tenor of the constitution restrict our interpretation of those terms to such incidental powers only as are necessary and inseparable from a useful and effective exercise of his command ; the terms therefore cannot of themselves be extended to the admission of a constitutional authority to call out the militia for mere purposes of state ceremony and useless parade.

The Governor is empowered by himself and others, to train, instruct, exercise and govern the militia ; all which terms imply a purpose of absolute utility. He is empowered to assemble them in martial array ; but it must be for the special defence and safety of the commonwealth. He is empowered to call them

into actual service, and to exercise over them the law martial; but it must be in time of war, invasion or rebellion, which must be declared by the Legislature to exist, and it must be only as occasion shall necessarily require. He is also entrusted with all those incidental powers which may enable him to use the enumerated powers with efficiency; but he is entrusted with no others; and his whole authority is to be exercised agreeably to the rules and regulations of the constitution and the laws of the land, and not otherwise; no general and indefinite military powers are given to him except in the emergencies specified.

That which is the true construction of this clause in the constitution appears more distinctly by reference to other parts of that instrument. The 17th Article of the Declaration of Rights, after reciting that the people have a right to keep and bear arms, declares that "as in time of peace armies are dangerous to civil liberty they ought not to be maintained without the consent of the Legislature; and the military power shall always be held in exact subordination to the civil authority and be governed by it;" and the 27th Art. "declares that no person (except in actual service) can be subjected to law martial, but by authority of the Legislature."

The 10th Sec. of the 2d Chap. "further provides, that no officer duly commissioned to command in the militia shall be removed from his office but by the address of both houses to the Governor, or by fair trial in court martial, pursuant to the laws of the Commonwealth for the time being."

Now it cannot be contended that the right of ordering out an escort of honor in ordinary and peaceable times is an *indispensable* appendage, or in other words a necessary incident to the powers expressly conferred by the constitution; it is neither conducive to the effective exercise of legitimate authority in governing the militia as it is required to be governed in such times, nor does its exercise in time of peace tend in the smallest degree to strengthen the constitutional power of the Executive in time of war, invasion, rebellion, or other great public emergency.

If then we find nothing in the language of the constitution which expressly confers upon the governor the power of calling upon his fellow citizens for military service, except "as occasion shall necessarily require;" and nothing from which the power to call upon them for the service of ceremonious escort can be reasonably inferred, we must look for that power, if it exists, in the statutes of this commonwealth, and the constitution

and laws of the United States, regulating and defining the service of the militia; but here we shall look also in vain.

By the Constitution of the United States, Congress has power to provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress.

Accordingly by the act of 1792, Chap. 33, and subsequent acts, Congress has provided for the enrollment and arming of all free white male citizens, between the ages of eighteen and forty-five (excepting certain exemptions) and for the organization of the militia so enrolled into divisions, brigades, regiments, battalions and companies as the Legislature of each State shall direct; and has established certain rules of discipline, agreeably to which the militia under this organization shall be exercised and trained; and has made further provision for the government of detachments of the militia when called into the service of the United States; but Congress carefully abstains from all unnecessary interference with the minor details of service in time of peace, and leaves them to be regulated wholly by the constitutions and laws of the respective states. Their enactments point only to a general readiness for effective service when needed for the public security, and called for according to law.

We are then brought to an examination of the statutes of the Commonwealth to discover what military service beyond the requisitions of the United States, is exacted of her citizens, and to learn what extent of executive power in commanding that service is conferred by legislative grant.

With respect to the power of the Governor as described in the constitution, we find limitation only and not extension in the acts of the legislature. By Statute, 1809, Ch. 108, Sec. 2d, the commander in chief, *with advice of Council*, (but not without) is authorized and empowered to *organize and arrange* the militia conformably to the Laws of the United States, and to make such alterations therein as from time to time may be deemed necessary.

By the 6th Section of the same statute, he is empowered, *with advice of Council*, to appoint officers to the command of such corps as may neglect or refuse to exercise the prescribed right of election. By the 24th Section of the same statute, it is enacted that whenever in case of threatened, or actual invasion, insurrection, or other public danger or emergency, the

militia shall be ordered out by the Commander in Chief; and any person neglecting or refusing to obey the order, he shall be subject to a forfeiture. These are provisions to aid in the case of a constitutional call by the Governor, and the statute contemplates no other. By the 31st and 32d Section of the same statute, the Commander in Chief is empowered to appoint General Courts Martial for the trial of officers of a certain rank, and to order Courts of Inquiry; and by statute, 1821, Chap. 92, Section 2, he is authorized to prescribe uniforms for the militia; and these are all the express powers given to him by statute.

Whence then is the power of ordering an escort of honor to be implied? If the right exist in the executive, there must exist a corresponding obligation on the part of the citizen to obey such an order, and the converse of this proposition being equally true, we may properly look through the statute book to learn what military services the citizens are required to render.

By Statute, 1809, Chap. 108, Sec. 9, we find every officer and private required to *keep himself constantly armed*; and this is the only constant and daily duty which the law exacts of the citizen soldier. He is required to render further occasional services on certain days and for certain purposes only.

By the 18th Sec. of the same statute it is enacted, that every commanding officer of a company shall parade his company on the 1st Tuesday of May, *for the purpose of inspecting their arms*; and that it shall be his duty to parade his company *by his own order* on three several days in the year *for training*, in addition to the company inspection aforesaid; and on the three several days of training to use his best exertions in instructing and perfecting his men in their company exercise and evolutions. It is further provided, that whenever he shall order out his company for inspection or training, or for any battalion, regimental, brigade or division *inspection or review*, his orders shall be made known in a certain form; and that no notice shall be *legal* for any company inspection or training, or for any battalion, regimental, brigade or division inspection or review, unless the same shall be given four days at least previous to the time appointed therefor; provided, however, that in case of invasion, insurrection or other emergency, any notice however short shall be legal and binding.

Setting aside therefore cases of great public emergency, the only military service provided for the militia by this statute, after attending to the election of their officers, is one company

inspection on a certain day, three company trainings to be ordered by the commander of the company himself, and such more general meetings by battalion, regiment, brigade or division, as may be ordered for the limited purposes of *inspection and review*; and least these should be ordered more frequently than would suit the public convenience, it is provided in Sec. 25, that the troops of each division shall be paraded *once in each year* for review, inspection and discipline; plainly implying that they shall be ordered no oftener on that service; and that even this requisition may not be made too burthensome upon the citizens, it is provided that no officer or soldier shall be obliged to march more than 15 miles to any such review. And except a certain notice be given in a prescribed form, no obligation arises to appear at any military meeting whatever.

The 34th Sec. of this statute promulgates a set of rules and articles for the government of the militia when not in actual service, by which pecuniary forfeitures are created for neglect to appear at any of these prescribed parades, but not others. The limited number of trainings, thus required of the citizen, is yet further curtailed by subsequent statutes, the language of which leaves no room to doubt that he cannot be lawfully required to appear at any other time, nor when appearing, to perform any other duties, than are therein expressed, and that every other appearance or service must be entirely voluntary. By Statute 1821, Chap. 92, Sec. 4th, it is enacted, that every commanding officer of a company shall have the same power and authority *to train and discipline* his company on the first Tuesday of May in each year as he has on other days, when his company is paraded for exercise; and the inference is irresistible that before the passing of that statute, the commander of the company had no power to train and discipline his company, because the previous statute gave him express authority to parade his company for purposes of inspection only; and no further military power could be implied, against the common right of the citizen to govern himself, subject only to the civil authority.

By Statute 1822 Chap. 102, Sec. 1, commanders of companies are authorized (in addition to the company inspection in May, and the brigade, regimental, or battalion reviews as now established by law) to parade their company by their own order *on one day in the year* for company discipline, *and no oftener*; provided nothing herein contained shall be construed to *prevent* any company from meeting for the purposes of drill, funeral

services, *escort* or other *voluntary* service ; and no further duty is required by law, from officers in the militia, than is required from privates, except the duty of keeping rolls, and making returns of the state of their respective commands, and instructing and perfecting their men in military exercises and movements on the days when they are by law permitted and required to do so.

From this cursory review of our militia system as established by law, it appears that the obligation to military service in time of peace is of the most definite and limited character. It can be required only on a few days in the year, and only for purposes of training, inspection and review. An *order* for escort service, is an order unknown to the law ; it is one which no private in the ranks is under the smallest obligation to obey ; consequently it is one which no officer has any lawful authority to give ; and no other or higher powers in this respect are conferred on the commander in chief, by the constitution and statutes of this commonwealth than on any of his subordinates in rank.

We are still more irresistibly brought to this conclusion, by inquiring into the limit of this authority, if it be admitted to exist ; if the governor may order out a corps to escort the whole executive and legislative authorities of the State, may he not also order it for his own personal escort ? If he may order it on one day, may he not on each day of the year ? If he may order out a company for each duty, may he not a regiment, or brigade, or a division ? And if so, why may he not order out the whole body of the militia from day to day, or any part of it, and thus in effect maintain a standing army in time of peace ? The constitution expresses no such power ; on the contrary, it expressly negatives it to the extent supposed, without the consent of the legislature, and that consent is as necessary to its lawful exercise in respect to a single corps, as in respect to the whole body of the militia, and upon any single occasion, as for the establishment of the stated and daily service.

Such consent was in fact recently obtained, when a military escort was desired to give additional brilliancy to the public celebration of the hundredth anniversary of the birth of Washington, which consent was as follows :—

COMMONWEALTH OF MASSACHUSETTS.

In Senate, January, 20th, 1832.

“Ordered, That His Excellency, the Governor, be requested to direct such military corps to perform the escort duties of the day as he may judge proper.”

The above is a true copy of an order, reported by the committee on the subject of celebrating the birth day of George Washington, (Feb. 22d, 1832,) as entered upon the journals of the Senate. The House concurred in passing this order.

Attest,

CHARLES CALHOUN,

*Clerk of the Senate.*SENATE CHAMBER, *March, 6th, 1832.*

By a resolve or order of the Legislature, the Governor was requested and empowered to call out for escort duty, such troops as he might select, for that extraordinary occasion, and under that authority only could his call have had the force of law. Similar precedents are found upon other extraordinary occasions; and if instances are also to be found, in which such orders have been issued and obeyed, without the intervention of the legislative voice, they were merely cases of voluntary and gratuitous service, the repetition of which, however frequent, could never be construed into the creation of a right on the one part, and a duty on the other. And this latter consideration answers the suggestion which might otherwise be made, that usage has established a distinction in respect to the service of the Independent Company of Cadets, and especially on days of General Election.

It is true that the Independent Company of Cadets, from its formation, or at least from the period of its reorganization under its present charter, has been a peculiar and privileged corps. Its officers by charter have a higher rank than mere company officers; and it is styled a divisionary corps, being attached to the first Division of the Massachusetts militia, but not incorporated into any regiment or brigade. It is also true, that during the same period, it has habitually escorted the Chief Military and Civil Authorities of the State on the annual day of General Election from the State House to their place of public worship, and thence has usually escorted them back to the State House, after divine service was ended; and it is further true that whenever the Governor of the Commonwealth has appeared in the metropolis upon occasions of military ceremony, and in his capacity of commander in chief, this corps has usually

performed the services of an escort and guard about his person. This has been justly esteemed among its proudest distinctions; the corps has been, and is deeply sensible to the honor of these privileges; and for a long series of years its officers and members have performed those services in a manner highly acceptable to the distinguished men who have successively filled the Chair of the State. But were they legal or voluntary services? Were they rendered gratuitously, and in consideration of the honor they carried with them, and in requital for privileges conferred, as the voluntary offering of respectful attachment and filial regard to the constituted authorities of the State, or were they duties exacted from them by the law of the land, demanded by the voice of authority, and accorded in reluctant submission to the legal exercise of constitutional power? It has been seen that both the constitution and the statutes of the Commonwealth, are silent in respect to such a power, and the charter of the company, though it grants peculiar privileges, imposes on its members no peculiar obligations; will it be suggested then, that long usage has made this a part of the law of the land, and that because those services have been gratuitously rendered for a series of years, they at last have grown into obligations, and that the commander in chief has thereby acquired the right to a use of military power, not delegated to him by the constitution, nor declared to exist by the express authority of the Legislature. To such a suggestion the answer is complete; that according to the settled principles of that common law, of which public, notorious, and long established usages constitute a part, there can be no lawful usage, which had not a lawful beginning, and the frequency of the act cannot make that right, which was in its inception wrong. If the commander in chief therefore had not originally a power from the constitution to order out the whole, or any part of the militia for a mere service of escort in time of peace, and no such authority is expressly granted to him by the Legislature, in respect to a particular day, or a particular corps, he cannot, by his own act, however often repeated and acquiesced in, create a usage equivalent to the declared law of the land to enlarge his constitutional office.

This Respondent, therefore, being so advised in point of law, respectfully insists, that the general order offered in evidence, of the 24th of December last, and all subsequent orders founded thereon, were without warrant of lawful authority, and, as military orders, were null and void; and that no officer in the

militia can constitutionally be put to answer by a Court Martial, for disobedience of orders, neglect of duty, or unmilitary and unofficerlike conduct in the execution of orders not warranted by law, and therefore not having the force of military commands. And for this he relies upon the 27th Art. of the Declaration of Rights, by the laws of which, "no person can in any case be subjected to law martial, or to any pains and penalties by virtue of that law, except those employed in the army and navy, and except the militia in actual service, *but by authority of the Legislature.*" And also upon the 10th Sec. of the 2d chapter, of the Constitution, which provides that "no officer duly commissioned to command in the militia, shall be removed from his office, but by the address of both Houses to the Governor, or by fair trial by Court Martial, *pursuant to the laws of the Commonwealth, for the time being.*"

By what authority of the Legislature then, and pursuant to what laws of the Commonwealth is the Respondent now arraigned before this Hon. Court, upon the charges preferred against him?

Those charges are, 1st, disobedience of orders ; — 2d, neglect of duty ; — 3d, unmilitary and unofficerlike conduct.

The only law in the statute book under which these charges can be supposed to have been preferred is the 1st of the rules and articles by which it is enacted (Stat. 1809, Chap. 108, Sec. 34,) that the militia of this Commonwealth shall be governed when not in actual service. The language of the 1st article is this — "Every commissioned officer who shall be guilty of any unmilitary conduct, neglect of duty, or disobedience of orders, or who shall when on duty appear or behave himself in an unofficerlike manner, or who shall wilfully oppress or injure any one under his command, or who shall at any time set on foot or join in any combination to resist or invade the lawful orders of any commissioned officer, shall be liable to be tried by a Court Martial." And the whole question is upon the true construction of this statute, as applied to the charges against this Respondent.

The specifications of those charges, as set forth in various forms, exhibit an order for escort service as disobeyed, duties arising in the discharge of the service as neglected, and the defective or irregular manner in which the same service was conducted, or attempted to be conducted, as amounting to unmilitary and unofficerlike conduct.

And first, of disobedience of orders. Can a doubt be enter-

tained that the orders, for disobedience of which an officer is by this statute made liable to the judgment of a court martial, must not be unlawful orders? And by the term unlawful orders, as applied to the definite and limited service established for the militia of this Commonwealth, must be intended not only orders directly repugnant to law, and illegal in a positive sense, but all military orders which are not expressly warranted by law, or necessarily implied as essential incidents to the execution of some lawful authority expressly given.

Now the substance of this charge under its several specifications is, that by a general order of 24th Dec. last, the Respondent was ordered to perform escort duties for the government on the day of General Election, and that having appeared with his company at the State House on that day according to the order, and having escorted the officers of Government to their place of public worship, he marched off thence with his company, and did not escort the procession back, though ordered so to do. But if, as heretofore, most respectfully insisted, no officer in the militia, not excepting the commander in chief, has power to order an escort in time of peace, it follows that the orders supposed to have been given, were unlawful orders, which the Respondent was not bound to obey, or in other words, that they were not orders, in the sense of the law, and consequently that he cannot lawfully be put to trial upon the question, whether he has disobeyed them or not.

Secondly, of neglect of duty. The several specifications of this offence charge no other duty to have been neglected by this Respondent, than the supposed duty of escorting the government back from their place of public worship to the State House. But where is the law which creates this duty? and what duty can arise in the militia service of this Commonwealth which is not created by some positive law, or which does not necessarily flow from some of its provisions? It is needless to repeat the argument:—if the right to require this service nowhere exists, there can be no legal obligation to perform it, and the omission to perform it on any one occasion, though on other and similar occasions it had been repeatedly performed, cannot amount to neglect of duty in the sense of the statute. And if the omission to perform it wholly is not a neglect of military duty as defined by law, does it not follow *a fortiori* that a partial omission or defective performance of the service is not so? Indeed the Stat. of 1822, Chap. 102. Sec. 1, before cited, expressly describes escort as a *voluntary service only*. And if

a voluntary service, how is it a duty? if not a duty, how is an officer liable for its neglect in the whole, or in any part?

Thirdly, unmilitary and unofficerlike conduct. In what? The specifications say, in defective and irregular execution of this same voluntary service. But when is an officer liable for unofficerlike conduct? The language of the statute is express, it is "*if on duty* he shall appear or behave himself in an unofficerlike manner;" and no citizen can be held to be on duty as a soldier unless engaged in some act, the performance of which is required of him by the law; nor can it be contended, without manifest absurdity, that a commissioned officer can in any case be guilty of *unmilitary* conduct, and at the same time, not guilty of an unofficerlike conduct.

In support of the foregoing positions, that no officer in the militia of this Commonwealth is liable in time of peace for disobeying orders, not founded on authority, expressly given by law, and that no military duties arise out of such orders, and that no unmilitary or unofficerlike conduct can be imputed to him for a defective or irregular performance of services so ordered, or for his demeanor at any time when not on military duty, the Respondent relies on adjudged cases in corroboration of his inferences from the language of the Statute Book. And he respectfully refers this Hon. Court to the printed report of the trials of Capt. Joseph Loring, Jr. on the charges of Gen. Winslow; and on the charges of Major Davis; the trial of Capt. Amos Binney on the charges of Major Osgood, and the trial of Capt. Thomas Howe on the charge of Major Messenger.

Also to the case of the State of Maine vs. Lieut. John Akers. Smith's Court Martial Reports, page 61.

GRENVILLE TEMPLE WINTHROP.

Whereupon the Court adjourned to meet on Thursday next at 12 o'clock.

THURSDAY, MARCH 8th, 1832.

The Court met pursuant to adjournment. Present. Brig. Gen. William Peck, President. Col. Thomas Davis, Col. Charles Lane, Lieut. Col. Abijah Ellis, Lieut. Col. Luther Eaton.

The Respondent was called and answered.

The Complainant was called and answered.

The Judge Advocate read the record of Tuesday.

The Complainant submitted a reply to the motion and argu-

ment of the Respondent, which is annexed, and is marked (6) as follows.

(6)

IN COURT MARTIAL.

8TH MARCH, 1832.

The Complainant, before proceeding to a Reply to the Respondent's objection, begs leave to observe to this Honorable Court that he came before this Tribunal in his *official military* capacity, prepared to prove an alleged *military* offence ; not in the least degree anticipating that the defence was to be grounded upon a great *constitutional objection*, striking at the root of all military authority and subordination. He once had the privilege of a seat at the Bar, but never the advantage of much of its practice, and for nearly twenty years has relinquished it altogether. For an argument upon such a question he therefore feels his entire incompetency ; and in the short time allowed him for its consideration, shall therefore only aim to present some very obvious reflections arising from the nature of our constitution and laws, and the manner in which they have been exercised, with the view of bringing the subject fairly to the consideration of the respectable Judge Advocate, whose opinion upon this important question those who are interested will consider with respect ; and to which, he is sure, the court will attach all the importance which is due to the judicious exercise of those legal attainments, upon this occasion, which have gained him no unenviable reputation in the commonwealth.

The Complainant then, with the leave of the court, observes, that by the record of the court, it appears that, after the Judge Advocate had obtained leave of audience of evidence under the first specification of the first charge, he was about to prove the facts set forth therein, and for that purpose read a Division Order founded upon a General Order, ordering the company of Cadets to perform escort duty on Election day. — To the introduction of that order and all evidence of acts done under it, the Respondent objected in the first stage of the evidence, on the ground that the General Order was in no respect binding upon the Respondent by the laws of the land, and that the subsequent orders and proceedings founded thereon, were in no respect obligatory upon the Respondent or his company ; and “ asserting that whatever was done by the Respondent or those under his command in consequence of those orders and in pursuance

thereto, *was voluntarily done, out of courtesy and respect to the commander in chief.*"—

In considering the Respondent's objection to the relevancy of the testimony about to be offered, the Complainant conceives, for the purpose of this argument, he has a right to consider the evidence before the court which he was thus able and about to produce.

The Respondent's objections are twofold.

1st. That the commander in chief has no authority, by the constitution and laws of the Commonwealth, to issue an order *for Escort Duty to any corps of militia not in actual service.*

It will be necessary for us to examine this bold position before we come to the second objection, and inquire how far the objection of the Respondent extended, which was founded upon this assumption of a voluntary service "*out of courtesy and respect to the commander in chief.*"

The constitution of Massachusetts Chap. 2, Sec. 2, Art. 7, which the Respondent has cited, provides "that the Governor this Commonwealth shall be commander in chief of the army and navy, and of all the military forces of the state by sea and land, and shall have full power by himself or any commander or other officer, or officers, from time to time, to *train, instruct, exercise* and GOVERN them, and he is afterwards, in the same article, entrusted with these and all other powers incident to the offices of captain-general and commander in chief and admiral, to be exercised agreeably to the rules and regulations of the constitution and the law of the land and NOT OTHERWISE." The only limit to this power in the constitution itself, is in the *proviso* to the section, "that he shall not transport any of the inhabitants out of the Commonwealth without their own voluntary consent, or the consent of the general court."

Before proceeding further, the Complainant calls upon the court to notice, that among the powers thus *directly conferred* upon the commander in chief, *that to govern the militia is of the greatest import to the point in controversy*; for it is presumed if the commander in chief has the power to *govern*, it will be admitted he has the power to *command*, and if he has the power to *command*, those who are subordinate to him *are bound to obey*. But as this and all his other powers are to be exercised agreeably to the rules and regulations of the constitution and the laws of the land, and as there is no restraint upon this power in the constitution itself, we are not to look among the *laws* to ascertain if this power is *taken away*; but there, only to

see in what manner its *exercise* is regulated. The *existence of the power* is beyond legislative control.

No act of the Legislature can deprive the commander in chief of his constitutional powers. But by the constitution, Chap. 1st, Sec. 1st, Art. 4th, the General Court hath full power and authority "to set forth the several *duties, powers, and limits* of the several civil and military officers of this Commonwealth, and the forms of such oaths or affirmations as shall be respectively administered to them for the execution of their several offices and places, *so that the same be not repugnant or contrary to the constitution.*" Here we see that the whole power of the general court, to *set forth the powers and limit the duties* of the civil and military officers of the Commonwealth is to be done in a manner *not repugnant or contrary to the constitution.* No law is cited by the Respondent, nor does any such exist to the knowledge of the Complainant, which attempts to *limit the power in question*, and as no rules or regulations are found in the constitution itself controlling the exercise of this power, the constitutionality of any such law might be *questionable*, if it existed, as it would be repugnant to a power, the constitution itself directly granted.

But in the present case, it is not necessary to push the argument to this length, as there is no law in the Statute Book, which is even repugnant *in its terms* to the power referred to; but *many* on the contrary, as will hereafter be shown, *in furtherance of its exercise.*

The power to govern and control the militia, or in other words, the physical strength of the country, is a power incident to the nature and design of all governments, and must exist somewhere. By our constitution, this is vested in the governor, and no act of the Legislature can take it away. If they can control the manner of its exercise, this to say the most is all they can do; and if they have not done this, the power remains entire, absolute and uncontrolled in the authority which is invested with it.

The 17th Article of the Bill of Rights is cited by the Respondent to show that the people have a right to keep and bear arms, and declares, that as standing armies are dangerous to liberty, they ought not to be maintained without the consent of the Legislature. This is all true, but it does not affect the question, for the governor's order to a company for the performance of escort duty, makes no approach of it to a standing army, nor is the provision, reserving the right to the people to bear arms,

controlled by his ordering them out for military service; for the right of the people to bear arms must be taken to be in strict subjection to the power, which by the constitution has the right to *train, instruct, exercise, and govern* them in their use.

"The military power," the Respondent again quotes from the Constitution Art. 27. "shall be held in exact subordination to the civil authority and be governed by it." True, and therefore, I hold, that to preserve the just subordination of the military to the civil power, the governor, or the *civil officer at the head of our government*, is vested with all the powers of a military chief, and, being sworn to support the constitution, is bound to exercise the powers of the latter, and to oblige all *military officers* under him to hold and exercise *their powers subordinate to the civil authority*; and for the abuse of this authority he is not amenable to a military tribunal, but to the highest civil court, in the Senate of the Commonwealth upon impeachment by the representatives of the people.

The power of the commander in chief to govern the militia at all times, in peace as well as war, is thus shown to be a substantial power, necessary for holding the militia or *military power* in that exact subordination to the *civil authority* which the Constitution requires.

That it is so viewed by the Legislature, is proved by the fact, that in no single law in the whole Statute Book, is there the least reference to, much less restraint imposed upon, this authority of the commander in chief, but, on the contrary, the authority is every where recognized as existing.

The first case cited by the Respondent, in which he supposes such a restraint is imposed, relates to the *arrangement* of the Militia into divisions, brigades, regiments and battalions; and this power, he observes, cannot be exercised by the commander in chief alone but only with the *advice of Council*.

It did not perhaps occur to the Respondent that this is a civil and not a military power. It is not exercised under any provision of the State Constitution, but is derived from the authority vested in the State Legislature by Congress, which, in exercise of its paramount power, to organize the militia, in the 2d section of the Act of 1792, provided "that within one year from the passing of this Act the militia of the respective States shall be arranged into divisions, brigades, regiments, battalions and companies *as the Legislature of each State shall direct*."

Thus the Legislature, which formerly made all the arrange-

ments of the militia by Special Legislative enactments, by the law of March 6th, 1810, directed the mode in which those arrangements should afterwards be made, and conferred that power upon the Governor and Council, or in other words upon the Executive branch of the government.

The Respondent cites the 6th Sec. of the Act of March 6th, 1810, which invests the Executive, or Governor and Council, with the power of appointing officers, as another case in which the Legislature have limited the constitutional power of the commander in chief by requiring the concurrence of the *Council* in his exercise of that power. How this is to be construed into a *limitation* of the governor's *authority to govern* the militia, I confess I am at a loss to determine. The words of the *Constitution* are, "And if the electors of brigadiers, field officers, captains and subalterns, shall neglect or refuse to make such elections after being duly notified according to the laws for the time being, then the Governor with the advice of Council, shall appoint suitable persons to fill such offices" — and the words of the *Statute* are, "and in case of neglect or refusal of any of the electors to elect any officer when ordered thereto, the commander in chief, with advice of council, shall appoint some suitable person to fill such vacancy." — The use of the singular instead of the plural number is the only limitation, which I can perceive in this law, upon his constitutional authority. My respect for the learned advisers of the Respondent forbids me to suppose they would have permitted him to use this argument if the constitutional provision I have cited, had occurred to their recollection.

With the above the Respondent cites the governor's power to call out the militia in time of insurrection, invasion or other emergency ; his power to appoint courts martial and courts of inquiry, and to prescribe the uniforms of the militia, and, observing that these are all the powers given to him by statute, inquires, whence then is this power of ordering *an Escort of Honor to be implied?*

I have endeavored to show, with the leave of the Court, not wherein the power of ordering out the militia is *implied*, but whence it is *derived*, and that it is from the power of the constitution to *govern* the militia which has been, not only *untouched* by the State Legislature, but has in no other way been affected by any act of the people, except by their adoption of the Constitution of the United States.

By the 1st Article of that Constitution, the States conferred on Congress "the power to provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions; to provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of the *officers* and the authority of *training* the militia, according to the discipline prescribed by Congress:" and by Article 2d it is provided: "that the *President* shall be commander in chief of the militia of the several States when called into the service of the United States." So far then, as the State by the adoption of the Constitution of the United States, has divested the commander in chief of the State, of his authority to GOVERN the militia, he is deprived of it, *and so far only*; and that is when they are called into the service of the United States under the Act of Congress of 1795, in the three emergencies named in the constitution; and then the militia is to be under the command of the President of the United States, and while it so remains in that service the commander in chief of the State is deprived of his power over it. In all the provisions of our statutes, cited by the Respondent, regarding the officering and training the militia, all the penalties affixed for not having arms and submitting them to the inspection of the officer, appointed by the United States' law, to perform that duty, reference is had directly to the powers reserved to the States in the Constitution of the United States, and, in no case, do they in any degree restrain or limit the constitutional power of the commander in chief, but only that of subordinate officers.

Having thus shown, that in neither of the cases cited from our own statutes by the Respondent, is the military power of the Governor to *govern* the militia, either *limited* or *restrained*, as he supposed, and that there is no restraint imposed upon it either by the constitution and laws of the United States, except for such part of the militia as shall be in the service of the United States in the three exigences named in the constitution, I will now endeavor to point out several acts of the Legislature in which the existence of the power is recognised.

The first of these in point of time to which I have referred is the act for the suppression of tumults, passed 20th Feb. 1787, seven years after the adoption of the constitution of Massachusetts and two years before that of the United States. This act provides, that "Whenever an insurrection shall have taken

place in either of the counties of this Commonwealth to obstruct the course of justice or the due execution of the laws, or there is reason to apprehend that a dangerous insurrection for such purpose will be exerted, it shall be the duty of the civil officers of such county immediately to give information thereof to His Excellency the Governor, who is hereby requested thereupon *to exercise the powers granted him by the Constitution* and to give immediate orders to the Major General of the Division where such insurrection exists, or is apprehended, and if he shall think it necessary, to the Major Generals of any other Divisions, to detach such part of the militia for the support of the civil authority as *he* shall judge fully adequate to the purpose, and for the safe keeping of those who may be concerned in such insurrection." Here the Legislature expressly recognises the *existence* of the power of the Governor to *Govern the Militia* and *request* its exercise. This statute was passed in the time of Shay's insurrection, a time of great public danger and calamity; and if the Legislature had not clearly seen the power, *already existing* in the Governor by the constitution to call out the militia, *would at once have invested him with it.*

The 2d Section of the Act regulating Elections, provides that no officer or soldier of the militia "shall be holden to do any military duty on any day (except on days which are or may be specially prescribed by law) on which the selectmen or assessors of any town or district shall appoint a meeting for the election of a Representative to the General Court, or on the day pointed out in the constitution for the election of Governor, Lieutenant Governor and Senators of this commonwealth, or on any day which is, or may be, appointed for the choice of electors of President and Vice President of the United States or Representatives to Congress," and "it shall not be lawful for any such officer to exercise any military command on either of said days, unless in case of sudden invasion made or threatened, *or in obedience to the orders of the commander in chief*, except as is herein before excepted, and every officer offending herein, shall for each offence forfeit and pay a sum not less than ten nor more than three hundred dollars."

Here the power of the commander in chief to order out the militia is not only *recognised*; but it is recognised as existing, in its lawful execution, on days of General Election, when all other officers are prohibited the exercise of a similar power by their own authority; and on those very days, when, by the

object of the statute, it might be supposed the military might interfere with the elective franchise of the citizens, the most inestimable privilege of freemen. If there are days in the Kalendar in which the legislature would restrain the commander in chief in his power over the militia, it would be on those very days which are named in this section, for they make it highly penal in any other officer to perform the very act, which, in the commander in chief, recognizing it as *an existing right*, they expressly except from the general prohibition.

To the 14th Sec. of the Act of March 6th, 1810, regulating the supplies for the artillery and the allowance of accounts for money actually expended in providing horses for drawing their pieces, there is a proviso full of import, which is, "that no allowance shall be made unless such company is ordered to appear at a battalion, regiment, field brigade or division inspection or review, or to march out of town in which the gun-house of such company is situated, *or unless such company is ordered on duty by the commander in chief.*"

This Section obviously has no relation to invasion or other similar emergency; nor does it in any degree restrict the right of the commander in chief to order the Artillery on duty at his discretion. It must therefore be applied to ordinary occasions of salutes, escorts and public celebrations, from its connexion with its other provisions.

In the 27th Section of the same act, prohibiting officers from calling out their commands on days of Election, there is an express admission of the legality of their orders for that purpose when issued by reason of invasion made or threatened, or in obedience to the orders of the commander in chief.

In the 7th Art. of the 34th Sec. same act, the admission of the governor or other superior officer's authority to order out a company is shown in the following words, "Every captain or commanding officer who shall either neglect or refuse to call out his company as often as, and at the times required by this act, or *at any other time when thereto required by his superior officer*, &c, shall be liable to be tried by a court martial."

In this Statute the days on which the militia shall be required to parade are expressly enumerated, and penalties are affixed for the non-performiance of the duty on each; and then the article goes on, and provides that the officer who disobeys the order of his superior officer for calling out his company at *any other time* shall be exposed to the like penalties for refu-

sing obedience as on the days expressly prescribed by law, thereby maintaining the true principle of militia subordination, that every officer shall obey the orders of his superior, and may justify himself by them.

The 1st Section of the Act of Feb. 11th, 1823, has been cited by the Respondent to show that the *number of company trainings are limited by law*; but I cite that Act for the purpose of showing that that limitation is confined to the number of trainings for *company discipline, which a commanding officer of a company, has a right to require "by his own order."* But in no respect does the Section restrain the authority of a superior to direct their being called out. The language is precise and does not admit of misconstruction; indeed it implies and recognises this authority in a superior by the application of the prohibition to commanders of companies to parade their company for company discipline, by *their own order*, oftener than one day in a year, leaving the obligation on the captain to obey the order of his superior officers, as it was imposed in the 7th Art of the 34th Sec. before cited. The restriction is special and qualified, and there is no other. It therefore clearly admits the exercise of that authority in a superior which it prohibits to the captain.

I could cite the Act of March 2, 1815, recognizing in the Governor or Major General appointing a Court-martial, a right to order a military guard for a Court-martial for which there was no previous provision by law; and allowing pay and rations to such guard when so ordered, and many other acts and provisions in support of my position. But contenting myself with the authorities already cited, and to bring the question home to the present occasion, I have only to refer the Court to the resolve of the Legislature of June 26, 1811, which is in the following words; "Resolved, that whenever the commander in chief of the militia of this Commonwealth shall direct any militia company or other corps to *perform escort duties*, that the commanding officer of such company or corps shall present his account for necessary music to the Quarter Master General, by whom the same shall be discharged *out of the Commonwealth's monies in his hands.*" If this Resolve required any comment it would be that under its provisions the Quarter Master General has paid the bill of the musicians employed by the Respondent on this very occasion, and charged the same (and the expense of a collation, which as usual was provided by the State for the company on similar occasions,) to the Government, and has settled his ac-

count and exhibited his vouchers, for *these particular items*, to the Committee, who were appointed to examine his accounts.

I might go on, if I had time, and show by numerous acts of the Legislature, from the formation of the Government, that the power of the commander in chief is not *limited in its opinion*, as the Respondent supposes. I could bring to his recollection the many occasions in which the troops of the Commonwealth have been called out for funeral escorts to its deceased governors and for firing salutes at the interment of other distinguished citizens who then held and had before held elevated civil or military stations under the State and United States' authority; and for the information of the Court I will annex copies of Governor Adams's order calling out the troops for a funeral escort to the remains of Governor Hancock (A), upon his own authority, and might, if it were necessary, others for like services on all similar occasions. On some of these, requests were made by the Legislature of the Governor that he would call out "such portions of the troops *as he thought proper*," the Legislature thereby recognising his power to call them out, and upon others they were called out upon his own authority without any such request, but in no instance has the Legislature refused to recognise the legality of the service by paying the incidental expenses.

I could call the attention of the Court to the occasion of the late President Monroe's visit to this metropolis when the militia was called out by general orders from the boundary of R. Island to the line of N. Hampshire (B). A like order was issued by Governor Hancock near 30 years before, on General Washington's visit in the year 1789; and one for escorting John Adams, then recently chosen Vice President of the United States, through all the divisions of the militia through which he should pass on his way to the seat of Government. I could bring to their recollection the joyous occasion and the brilliant appearance of 5000 troops on Boston Common, for Review (C), by him who, by way of distinction, was lately called the nation's guest, and shew them the Resolve of the Legislature requesting the Governor to receive him in such a manner as he thought proper. I will annex these papers for the information of the Court, and if I had time would append to them the accounts for the expenditures of music and a dinner to the militia officers and others, 700 of whom dined under one tent on the Common, the bills for all which were paid by the Legislature, to an amount of upwards of \$5000.

I could carry them back to the year 1816, when Mr Jeffer-

son, after the purchase of Louisiana, sent the chiefs of the Osages, through the whole of the eastern cities, to show them the strength of the nation, and to discourage them from war. On that occasion the Legislature requested the Governor to order a salute of artillery on their arrival at the State House for introduction to both Houses of the Legislature, which was then in session, at which time each of the chiefs were presented with a silver chain (D1). I will annex that resolve, and the general order of the Governor (D2), complying with the request of the Legislature, for firing the salute; and then another order of his (D3), issued three days afterwards, ordering Major Gen. Elliot to call out all the uniform companies in Boston for the exercise of military manœuvres and firings, in the presence of our red brethren of the newly acquired wilderness which they then inhabited. This latter order is strongly illustrative of the construction *then* and *before* and *ever since put*, not only by all the Chief Magistrates who have occupied the Chair of the State, but by all the various Legislatures from the foundation of the government, to the late centennial celebration of the birth of our National Father. On the occasion first referred to, the Legislature *had* acted, and pointed out the mode in which they desired the Governor should receive the Indians. That request was complied with. But Gov. Strong, as sound a lawyer as ever occupied the Chair of State, who every one knows had no political predilection for Mr Jefferson's politics or policy, judged that the emergency which then presented, required a greater exhibition of our military strength and science than the legislature had requested; and in the exercise of his constitutional power, three days afterwards, upon his own responsibility, while the legislature were in session, ordered a large body of troops to be assembled and manœuvered, and directed them to go through various firings in the presence of the Indians, for which the troops were supplied with powder by his order. The occasion, or emergency, was a special one not provided for by law, and the power which the governor exercised, was derived from a power in the constitution, of much greater weight, and more express than any authority the legislature can find in that instrument for a "present of a silver chain to each of said chiefs."

This policy was followed by other cities and states, and the wisdom of the deposit of power which adapted it, is shown in its probable effect of deterring the Indians of the West from making war upon our frontiers, from that time to the present. This and the other cases which I have cited, not only show that the

exercise of this power by the commander in chief, has not only been recognised and acquiesced in by all branches of the government and people; but that it is a *useful* power, safely deposited, giving dignity and honor to our national and state celebrations, and tending by the *exhibition of the nation's strength*, to the preservation of *the nation's peace*.

I have annexed two or three orders for calling out the Cadets and other troops on the national anniversary (E1 to 5). The first was a direction of John Hancock in his own handwriting to the Adjutant General—others were by Samuel Adams, and similar orders have been issued by every governor from that time to this. They are too numerous to be copied. The list (G) annexed, giving the dates of 98 orders for escorts to the governor and supreme executive, on Election, Independence and Commencement days, from 1796, to 1831, shows the invariable practice. All these and numerous others (if I had time to look them up,) of similar character, relate to troops which have been called out in emergencies, for which *no provision is made by law*, and they must have been issued by the several governors in the exercise of their *constitutional power to govern* the militia, and the powers incident to their office of captain general and commander in chief. And if their powers have not been exercised according to any express "*law of the land*," on such occasions they have not been *contrary* to it, nor I trust in a manner "*repugnant to the constitution*."

That the power of the commander in chief over the physical force of the State is one of great import is admitted. So also it is that its exercise is to be indulged in upon the *highest responsibility*. For the just use of his authority in this respect, as in all others, the governor is responsible to the people, and to the highest tribunal, with judicial power, which the constitution has provided for the trial of those elevated functionaries who are charged with the abuse of their official powers.

As I have not had time to copy some of the papers referred to, I will hand them, with others illustrative of the subject, to the Judge Advocate, with the leave of the Court to be appended to the record.

Does this Honorable Court think it necessary for me now to reply to the 2d objection of the Respondent, that no military punishment can be inflicted for the non performance of a voluntary service?

If not for the purposes of the present inquiry, as a point is now presented which is often mooted, I hope the court will in-

age me in a few remarks, to show that this position of the Respondent is totally untenable. But lest I admit too much, by proceeding directly to this inquiry, I must first show, that under the facts in proof of the first specification, which the Complainant was about to prove, when the Respondent's objection was presented, the services rendered were not a *voluntary*, but an *obedient* service.

The Respondent was under orders; those orders are read; the delivery of them to the Respondent is proved; no exception was taken to the *time*, or *manner* of their delivery; but, in *obedience to them* a report was made that the Respondent was ready to execute the orders which the commander in chief had given him. It is now too late for the Respondent to take this on any exception to those orders, or to the shortness of the notice he received for their execution; and although another face will be put upon the present appearance of things, in respect to *timely* notice, which cannot with propriety now be adverted to; yet, considering it in its present aspect, for the purpose of this argument, let me inquire whether the want of timely notice cannot be waived in military as well as civil affairs, and whether a report for duty under a military order is not equivalent to a plea upon the merits in a civil suit. If the notice for the duty was not such as the Respondent had a right to receive; or, if the governor had no right to require the services which the order imposed, *there was a time* when those objections would have found a valid excuse for refusing obedience; but that time *was before the report for service*. That report was both an acknowledgment of the authority which ordered, and of the sufficiency of the notice which had been received.

That men under arms can associate together for the performance of military evolutions, can choose their commanders, and voluntarily train under their nominal authority as long as they please, obey *if* they please, and disobey *when* they please, and not be amenable to any public authority, is admitted. But this is not the kind of voluntary service which the objection supposes. This, I conceive to be a voluntary tender of military service by one in commission who has a right to render it, to a superior in authority, who has a right to receive it. This is the kind of voluntary service, for the non-performance of which, it is said, no military punishment can be inflicted under our laws. Is it so? Will the principles of military subordination permit him, who has a right to do the service in obedience to the authority to which he has voluntarily submitted for its performance, to cease

in the execution of that service, *at his own will*. The obligation he has assumed is an *entire* obligation, and must be *wholly* performed, or the neglect of its performance is a culpable act. The 21st, 22d, and 23d Articles of the 34th section of the militia law are authorities upon this point. When non-commissioned officers or soldiers *are under arms*, in their proper military relation, or when on duty (no matter how) if they conduct in a *disorderly manner* or are guilty of any *unmilitary conduct*, by the 21st article they may be put under guard; and shall moreover forfeit not less than \$5 nor more than \$20, according to the aggravation of the offence.

Any non-commissioned officer or private who shall quit his guard without leave, *while on duty*, and any such one *being under arms*, who shall without order discharge his musket, rifle, or pistol, shall forfeit the sums which the 22d and 23d articles have imposed for those offences.

Shall it then be said that the officer can commit an act of insubordination, while on duty, with *impunity*, for which a private could be punished? Or shall not the officer be held amenable to a court martial, for an act, *while on duty*, for which, upon a private, a fine could be inflicted. If a senior in commission should volunteer to act on some special occasion, under his junior in authority, having submitted himself to that authority, is he not bound to comply with its commands, or can he comply with them in part, and neglect them in part, and excuse himself by saying that it was a *voluntary service*, and because he was not bound to undertake it, he was not bound to complete it? If this is permitted in the militia, it must be in the army; and how many a forlorn hope would be sacrificed, and what disastrous results would attend those desperate assaults and enterprises which are often necessarily undertaken, by the conduct of those, heartless volunteers who should thus *reason themselves* out of the danger, into which they had brought their associates.

When the obligation is undertaken, the duty must be performed to the extent of the undertaking; and as well might he who volunteered in a forlorn hope justify himself for running away, when he found he had engaged in a too hazardous enterprise, as a volunteer, who, after having undertaken to perform escort duties for the government, reported for service, received his order and performed a part of the duty, excuse himself from the completion of the service, by any after considerations which should present themselves. When the Respondent volunteered for this service, if he had said to the governor, I will escort the

government to the church, and if I find it convenient, will wait, and escort the procession back again ; it would not have taken the governor long to decide upon the propriety of accepting the offer of service, upon the condition on which it was tendered, and the Cadets would have been relieved from the performance of a duty which they have heretofore always considered as a privilege, and from which, from the foundation of the government, both the commonwealth and themselves have taken great pride and satisfaction.

In this argument, I have purposely avoided considering the Cadets in the particular relation in which they stand to the government, and the peculiar obligation they are under, from the rank of their officers, and their arrangement in the division, to the performance of a duty, which from the first records under the constitution, they have claimed the exclusive honor of performing. I have omitted to draw any argument, in this stage of the proceedings from this consideration, because the Respondent's denial of the governor's power to order an escort was of a broader character, and covered the general ground that the governor had no power to order any part of the militia to perform escort duty ; preferring myself that the decision of the court should be had upon the general principle, and not be influenced by the peculiar circumstances of this particular company.

The hour having arrived for me to appear before this honorable court, I must plead this in excuse for no further enlarging in reply to what, under the circumstances of the case, must be considered as astounding objections, which the Respondent has presented as a ground of defence. What would his venerable ancestor do, who granted the charter of the company and gave its officers signal rank, and the company the special privileges which for fortyfive years have been accorded to it, if he were present to hear the doctrine by which its conduct is vindicated, would he not take back the worthless parchment and commit it to the flames ? How astonished John Hancock, and Samuel Adams, the proscribed patriots of the Revolution and the strict adherents of the doctrine of limited powers, would be, if they were here, at the discovery, *that they were the first aggressors upon the constitution and had stretched its powers for their own dignity and for useless parade*—and Gerry, and Brooks, and Eustis, who had fought in the cabinet and in the field for the victory which the constitution consecrated, that they too, had been guilty of constitutional usurpation,—and the six eminent lawyers who have occupied the chair of state, most of whom were members of the

convention which formed the bill of rights and set forth from it the form and the limits of the different powers which it imparted; what would be their plea, to the charge of the Respondent, *that they could not read the Book which they had written.* Thank God they yet lie peaceably in their graves, and if their spirits are present when the opinion of the Court is given, I trust, they will hear nothing to disturb the peace of their conscience or the quiet of their slumbers.

WM. H. SUMNER.

(A.)

GENERAL ORDERS.

Head Quarters, Boston, October 9th, 1793.

By the decease of His Excellency John Hancock, Esquire, late governor of this commonwealth, on the eighth instant, the chief command of the militia devolves on his Honor Samuel Adams, Esquire, as captain general; and by his order military honors will be paid the deceased at the funeral which will take place on Monday next, precisely at three o'clock in the afternoon. The militia required for the above purpose will consist of the following, viz :

All the uniformed infantry in Boston, together with the light infantry of the sixth regiment of the first division; such uniformed companies of infantry of the third division as are most contiguous to Boston, not exceeding one hundred rank and file; two troops of cavalry of the first division, and one troop of cavalry of the third division. The whole to be properly officered, including three field officers from the first, and one from the third division. The several corps which shall be thus detached, will assemble on the Common, in Boston, at twelve o'clock, at noon, on the said day, and Brigadier General Hull of the third division will take the command of the whole.

Major Generals Jackson and Brooks will report to the adjutant general as soon as possible the several descriptions of corps which they shall detach in conformity to this order, with the number of rank and file in each, and the names of the field officers, in order that the arrangement for the day may be made previously thereto. Major General Jackson will also order one company of artillery with their field pieces, and provided with one hundred and twenty pounds of flannel cartridges, to parade at the same time at the Laboratory, in Boston, subject to such other orders as shall be given them.

By order of the Captain General,

WM. DONNISON, *Adj. General.*

(B.)

COMMONWEALTH OF MASSACHUSETTS.

GENERAL ORDERS.

Head Quarters, Boston, 30th June, 1817.

Major General Crane will direct the Independent Cadets, commanded by Lt. Col. Rogers, to parade in State street, on the day of the *President's arrival* in Boston, and after he dismounts from his horse, receive and escort him to his lodgings at the Exchange Coffee House.

By his Excellency's Command,

E. MATOON, *Ad. Gen.*

(C.)

COMMONWEALTH OF MASSACHUSETTS.

GENERAL ORDERS.

Head Quarters, Boston, Aug. 25th, 1824.

His Excellency, the commander in chief, orders that the 3d brigade of the 1st division; the 1st and 4th regiments of the 1st brigade, 2d division; the 1st, 2nd, and 5th regiments of the 1st brigade, 3d division; the artillery companies of the towns of Salem, Lynn, Danvers, Charlestown, Lexington and Watertown (excepting such officers, non-commissioned officers and privates, as reside in the towns of Newton and Brighton) be assembled on Boston Common on Monday next, at 9 o'clock, A. M. for review.

A Colonel and Major will be detailed from the first brigade and 3d division, and a Lieut. Colonel from the 1st brigade and 2d division, to command the artillery of the 2d and 3d divisions.

The 3d brigade of the 1st division will be under the command of Brigadier General Theodore Lyman, Jr. of that brigade, and the remainder of the troops will be formed into another brigade, under the command of Brigadier General James Appleton, of the 1st brigade, and 2d division; the whole to be under command of the Major General of the 1st division, &c, &c.

General La Fayette will receive the salute of the troops at 12 o'clock, &c, &c.

(D 1.)

Report of the Committee respecting the Osage and other Indian Chiefs.

FEB. 28, 1806.

The committee of both Houses appointed to consider the expediency of making arrangements for the reception of the *Chiefs of the Osage and other nations of Indians*, now on a visit to this metropolis; with a view to impress them with the disposition and wish of this commonwealth to cultivate peace and friendship with them, and their nations, have considered the subject committed to them, and ask leave to report :

That His Excellency the Governor be requested to appoint such persons as he may think proper, to conduct the said chiefs to the State House, tomorrow, at 12 o'clock, and to introduce them to His Excellency the Governor and Council, and each branch of the legislature, in which seats shall be assigned for them, and to return with them to their places of abode, and to order out a company of artillery, who shall fire a salute upon the Common upon their arrival at the State House, and to make such other arrangements as he may think proper; and that his excellency the governor be requested to *present each of said chiefs* with a *silver chain*, to be procured by the Quarter Master General.

(D 2.)

COMMONWEALTH OF MASSACHUSETTS.

GENERAL ORDERS.

Head Quarters, Boston, Feb. 28th, 1806.

Major General Elliot will order a company of artillery, with two six pounders, to parade before the State House tomorrow, before noon, at about 11 o'clock, and when the *Western Indian Chiefs* shall come to be introduced to the government, the Company will fire a salute, as shall then be directed.

The Quarter Master General will supply the necessary ammunition.

By order of the Commander in Chief.

WM. DONNISON, *Ad. Gen.*

(D 3.)

COMMONWEALTH OF MASSACHUSETTS.

GENERAL ORDERS.

Head Quarters, March 1st, 1806.

Major General Elliot of the 1st division, will order as many of the uniform companies in Boston to parade on Monday next, as he thinks can be called out with convenience. Among the troops ordered out, there will be at least one company of artillery. The detachment will be paraded and formed on the Common, in Boston, at 11 o'clock before noon, and when formed will perform various evolutions and firings in front of the State House.

The Quarter Master General will furnish the necessary ammunition.

By order of the Commander in Chief.

WM. DONNISON, *Ad. Gen.*

(E 1.)

COMMONWEALTH OF MASSACHUSETTS.

Boston, June 23, 1787.

Whereas, Wednesday the 4th day of July next ought ever to be celebrated as the anniversary of American Independency by the good people of this Commonwealth, but more especially by this metropolis? In order that there may be a military parade on that day, I have ordered out the Boston regiment of militia to form a line on the Common; and in order to add lustre to the appearance of the day, you will order Swan's company of horse, Otis's Lt. Infantry company and Bartlett's Republicans to turn out completely equipped, at nine o'clock in the morning of said day, (if fair and suitable weather, if not the next fair day) and form a line under the command of the senior officer of the Boston Regiment.

I am, Sir, your most obedient humble servant,

JOHN HANCOCK.

To J. KEITH, Esqr, *Adj't, Gen'l*, or
in his absence, to JAMES SWAN, Esq.
D. A. G. 1st Division.

[N. B. other orders respecting this on file.]

(E 2.)

GENERAL ORDERS.

Head Quarters, Boston, May 7th, 1796.

The Major General of the first division will order the company of Cadets, in Boston, to attend the Supreme Executive, as an escort, on Wednesday the 25th instant, being the day of General Election. The company will parade for that purpose before the Council chamber, at 11 o'clock, A. M., and the company of artillery in Boston, will be ordered to fire *fifteen guns* at meridian. The Quarter Master General will supply the necessary ammunition for the artillery in Boston, and *fifteen guns* will be fired at *Castle Island* at the same time.

By order of the Commander in Chief.

WM DONNISON, *Ad. Gen.*

(E 3.)

GENERAL ORDERS.

Head Quarters, Boston, June 23, 1796.

Brigadier General Cushing, of the 1st brigade, 1st division, will order the company of Cadets, of Boston, to parade near the Council chamber on Monday the 4th day of July, at 11 o'clock, A. M., to escort the supreme executive of the commonwealth. The brigadier will also order the company of artillery, in Boston, to parade on the same day at some suitable place in Boston, with their pieces, and to fire at sun rising, at noon, and at sun setting, fifteen guns at each time; and the Quarter Master General will furnish the necessary supplies.

By order of the Commander in Chief.

WM. DONNISON, *Ad. Gen.*

(E 4.)

GENERAL ORDERS.

Head Quarters, Boston, June 23d, 1797.

The commander in chief being desirous that the celebration of the anniversary day of American Independence, in Boston, be accompanied with military exhibitions, Major General Elliot of the first division will give orders for the calling out for parade, such part of the 1st regiment as he shall think expedient, together with the cavalry, artillery and other corps in Boston. And he will also make the necessary arrangements and

give such directions for the military exhibitions, on the field on that day, as he shall judge suitable to the occasion. Captain Amory's company of cavalry will be the escort of the commander in chief between Roxbury and Boston, and will parade at his house in Roxbury, so as to set out from thence at 11 o'clock, A. M. Lieut. Col. May's company of Independent Cadets, will be his escort while in Boston, and will parade for that purpose at the Council House, at 12 o'clock, M.

The Quarter Master General will furnish the company of artillery with the necessary ammunition.

By order of the Commander in Chief.

WM. DONNISON, *Ad. Gen.*

(E. 5.)

GENERAL ORDERS.

Head Quarters, Boston, May 9th, 1797.

The Major General of 1st division will order the company of Cadets, of Boston, to assemble on the 31st instant, being the day of general election, as an escort to the supreme executive, and parade for that purpose at 11 A. M. near the Treasury. The Boston company of Artillery will be ordered to fire fifteen guns at meridian on said day, and the commandant of the *fortress on Castle Island* will fire fifteen guns at the same time.

The Quarter Master General will furnish the necessary ammunition and military stores.

By order of the Commander in Chief.

WM. DONNISON, *Ad. Gen.*

(G.)

"The list,"—marked G. referred to as containing "98 orders for escorts to the Supreme Executive, from 1796 to 1831," stating only their several and respective dates, is here omitted, with the remark as is there stated, "that the 1st vol. of records is full of them."

The Respondent suggesting to the court a wish to answer the argument of the Complainant, and the court directing the Judge Advocate to deliver them an opinion upon the validity of the Respondent's exceptions, the court ordered an adjournment to Monday next at 3 o'clock, P. M.

MONDAY, 3 o'clock, P. M., MARCH 12th, 1832. The court met pursuant to adjournment. Present, Brig. Gen. Wm. Peck,

President. — Col. Thomas Davis ; Col. Charles Lane ; Lieut. Col. Abijah Ellis ; Lieut. Col. Luther Eaton.

The Respondent was called and answered.

The Complainant was called and answered.

The Judge Advocate read the record of Thursday last.

The Respondent rejoined to the reply of the Complainant, by reading the contents of a paper, which is marked (7), viz.—

(7)

May it please the Court :

The Prosecutor appearing “in his official military capacity,” professes with very unnecessary modesty, “entire incompetency” to discuss the legal questions now under consideration, and at the same time craves the indulgence of the court for a very elaborate argument which he submits. As the argument, however, claims to be his own, the Respondent might be deemed wanting in forensic as well as military courtesy, did he not admit that the prosecutor less needs indulgence from the court for the want of legal information adequate to the occasion, than for a degree of zeal and warmth in the conduct of the prosecution which has caused him to soar somewhat beyond the jurisdiction of earthly tribunals acting upon human affairs, and upon a dry point of constitutional law eloquently to evoke the spirits of departed patriots and statesmen as fit judges of this cause.

The questions submitted by the Respondent’s motion, are nevertheless, grave questions of law, (not much to be affected by flights of declamation, or pathetic appeals to the illustrious dead). They are to be decided upon reason and argument, after due deliberation, with the advice of the Judge Advocate, your appointed counsellor in all matters of law, the court acting on their own responsibility as officers and as individuals, and he on his, as an officer and a professional lawyer.

But although these are questions of law, which the Respondent is advised are material to the validity of the proceedings of this court, and which therefore by advice of counsel he respectfully submits, he begs leave to assure the court that he feels little solicitude on his own personal account as to the event of their decision. Conscious that no disrespect to the government was ever intended or imagined on his part, that no military orders, lawful or unlawful, which reached him were wilfully disobeyed, nor any part of the service undertaken by him, (whether voluntarily or as in duty bound) intentionally neglected ;and confident that it will eventually appear in proof, that it

was not fairly attributable to any culpable negligence of the Respondent, that any misadventure may have befallen the authorities of government on the day of the last general election, he will regard the decision of the present question should it be against him, with no other or deeper regret, than every good citizen must feel who believes that the constitution and laws of his country are bent, (even in a small matter,) to the voice of official authority.

The Respondent and the whole country with him, would regret to find, if they should find, that the proudest distinction of the free governments of these United States, the paramount power of their written constitutions over all the uses and abuses, however ancient, however frequent, of those who have administered the highest offices of the State, is after all insufficient to withstand the influence of subordinate authority, called out upon the occasion of a petty accident of neglected ceremony. He would especially regret it, if the doctrine contended for by the Prosecutor should receive public sanction from a gentleman of high professional reputation; a doctrine which cannot be shown to stop short of absolute and unlimited military power in the hands of the governor of this commonwealth, and which, if true, leaves the existence of our boasted civil rights dependent on the mere forbearance of the supreme executive to exercise constitutional powers which might annihilate them at his pleasure, but for checks of a character widely different from those which the constitution provides.

That such are necessary consequences from the position taken and attempted to be maintained by the Prosecutor, the Respondent, with permission of the court will presently proceed to show, if indeed it be not already manifest.

In the meantime, may it please the court, the Respondent hopes that it is unnecessary for him now, and that it will be unnecessary for him hereafter to state, that in no remark made, or intended to be made, by him in the conduct of his defence, will there be found any allusion to the office, dignity and constitutional power of the governor of this commonwealth, having a personal application, or which might by any possibility be construed into disrespect towards His Excellency the present Commander in Chief. He views the conduct of that distinguished magistrate in this proceeding so far as is yet developed, as entirely official, and it is a source of peculiar satisfaction to the Respondent, notwithstanding the charges here

preferred, proceed on the mistaken supposition of an intentional offence towards his Excellency, that the proceedings of this court must finally pass under the revision of his Excellency himself, who needs no advice upon his Constitutional rights, having passed to his present elevated station from one scarcely less elevated, which secures from him a responsible judgment even upon the validity of his own proceedings.

But the Respondent claims a right to distinguish between his excellency the commander in chief, whether as an individual or a magistrate, and the official representation of his excellency in this court through the head of his excellency's staff. The conduct of his excellency's course and the arguments exhibited in its behalf, the Respondent claims the liberty to discuss with the same freedom as if they belonged to any other opponent in a judicial investigation.

Before proceeding to examine the argument and authorities of the Prosecutor, the Respondent will briefly re-state his own positions.

The Respondent excepted to the General Order of 24th Dec. 1831, offered in evidence, and to all subsequent orders and proceedings founded thereon, on the ground that said order was not binding on the Respondent or his corps by the laws of the land; that all subsequent orders and proceedings founded thereon were equally without lawful authority, so as to be binding on the Respondent or his corps, and that the Respondent was not liable to a trial by court martial for an imperfect performance of services which were in their nature voluntary and gratuitous.

By the General Order in question Major Gen. Capen was required to detail the Independent company of Cadets to perform escort duties for the government on the day of general election; and it was directed that the company should repair to the State House at noon, and there report to his Excellency the commander in chief for further orders. And the division order of Major Gen. Capen, transmitting the General Order, required the Respondent to comply with these directions.

In support of the exception to these orders, it was contended that a power in the governor to call out a corps of militia, not in actual service, for escort duty, in time of peace, was neither expressed nor implied in the constitution of this commonwealth; that neither the constitution and laws of the United States, nor the statutes of the commonwealth, had added to the governor's original constitutional military powers in this

respect ; that the militia service was a limited service, defined by law, restricted to certain useful purposes only, and to be performed on certain prescribed occasions, of which escort was not one ; that no obligation rested on a private to obey such an order, and consequently no right could exist in any officer to issue it ; and that any other construction of the constitutional power of the governor would create in him an unlimited military power ; that services of this kind heretofore rendered, had been rendered voluntarily and not as duties, and that no usage in this respect could invest the governor with an unconstitutional power ; and that if the order had not a binding authority, no charge founded upon it could be maintained, either for disobedience of orders, neglect of duty, or unmilitary and unofficerlike conduct in the sense of the law.

The Prosecutor on the other hand insists, that by the constitution the governor has complete authority over the militia as captain general and commander in chief, and may order them out in time of peace as well as in time of war at his pleasure ; that this constitutional power has neither been limited nor is capable of being limited by any legislative act ; and consequently that it exists and must exist in full force ; a power to be exercised by the governor upon his official responsibility, under his oath to maintain the constitution, and liability to impeachment for its abuse ; that its existence is constantly recognised in the public laws of this commonwealth, not only in the general but particularly in relation to orders for escort ; and that such orders have received the sanction of long usage and universal practice in this commonwealth from its foundation and are lawful orders ; that if not, it was too late for the Respondent to except to orders under which he had acted, and that even a voluntary service, when actually undertaken and entered upon, becomes obligatory, and subjects the Respondent on that ground to be tried upon the present charges.

The arguments and authorities upon which these positions rest it is now proposed to examine.

The governor, according to the language of one clause in the constitution, “ shall have full power by himself, or by any commander, or other officer or officers, from time, to time to train, instruct, exercise and govern the militia and navy ; and for the special defence and safety of the commonwealth to assemble in martial array, &c, and to lead and conduct, &c, within or without the limits of this commonwealth, and also to kill, slay and destroy, &c, and to use and exercise over the army

and navy and over the militia in actual service the law-martial in time of war, &c. And that the governor be entrusted with all these and other powers incident to the offices of captain general and commander in chief and admiral, to be exercised agreeably to the rules and regulations of the constitution, and the laws of the land, and not otherwise; Provided, that the said Governor shall not at any time hereafter by virtue of any power by this constitution granted, or hereafter to be granted to him by the Legislature, transport any of the inhabitants of this commonwealth, or oblige them to march out of the limits of the same without their free and voluntary consent, or the consent of the General Court, &c."

The argument of the Prosecutor in respect to the extent of the power conferred by these clauses is founded wholly upon the import of the term, "govern." It is contended that the power to govern, when taken without qualification, includes the absolute right to command and the unlimited obligation to obey; and that this broad and general power is restrained by nothing in the constitution except the proviso which forbids the commander in chief to transport the inhabitants beyond the limits of the commonwealth without their own consent. On the other hand the Respondent insists that this proviso plainly refers only to those cases of emergency spoken of, in which the governor has express power *to assemble in martial array, and put in warlike posture* the inhabitants of the commonwealth, and *to lead and conduct them without or within the limits of the same* against some common enemy. If therefore the Prosecutor's construction of the import of the term govern as applied to the militia in time of peace be correct, and the proviso is the only constitutional limit to the governor's power to military command, it follows, that the wisdom of our ancestors in framing a form of constitutional government designed to secure the civil rights and liberties of the people, thought it superfluous to set any limit to the supreme executive control of the whole military force of the commonwealth in time of peace, while they thought it important to set one limit, at least, to its control of the military forces in time of war; that is, they thought it prudent to curtail the power of this military chieftain only in its exercise against the public enemy, leaving it free to act against the State; a doctrine to use the language of the Prosecutor "too absurd for further argument."

The 17th article of the Bill of Rights, which declares that in time of peace armies ought not to be maintained without the

consent of the Legislature, and that the military power shall always be held in exact subordination to the civil authority and be governed by it, is not admitted on the part of the Prosecutor to be at all inconsistent with the theory of unlimited military power in the governor during a time of peace. But how are they reconciled? What is supposed to be the constitutional check, devised by the distinguished statesmen who framed this scheme of government? What is there to prevent the governor from ordering out bodies of troops from day to day, thus in effect maintaining a standing military force in spite of the constitution? Why, the Prosecutor says, the check consists in this, namely, that the governor is himself the supreme head of the civil as well as of the military department of the government, and that being sworn to maintain the constitution, he is bound by his oath of office to subject his own unlimited military power, over which the Legislature can have no control, to his own authority as the civil head of the government; and if he do not in fact keep his own military power in exact subordination to his own civil authority, and strictly govern himself in one capacity by himself in another capacity, what is the consequence? Why after the Legislature shall have convened, (who by the way can be convened to an extraordinary session only by the governor himself) he is liable to be arraigned, and in due process of time will assuredly be convicted, upon impeachment before the senate of the commonwealth by the representatives of the people for exercising his constitutional powers. What a check is this to the unlimited power of a military chieftain at the head of an armed force, ready, if the case can be supposed, and bound, as the prosecutor supposes, to obey his commands, provided they are confined to movements within the limits of the commonwealth; such a security for civil liberties has hardly been thought of since the days of the Protector of England. The constitution provides but a feeble barrier indeed to the abuse of military power, if it be one which rebellion must infallibly precede, during its work of bloody reform before the constitutional machinery of government can fairly be set in motion.

The serious reply of the Respondent to the Prosecutor's construction of the constitution, giving to the governor unlimited control over the militia in time of peace, is this;

In the first place it is against the whole theory of our free representative government, which is limited in all its departments; a topic which the Respondent will hereafter more fully discuss.

But, independently of this consideration, the Respondent denies the first step taken by the Prosecutor to reach his extraordinary conclusion. He denies that the power to *govern* the militia, involving the right to command and the obligation to obey, implies a power to *order out* the militia on any occasion or for any purpose. The power "to assemble" the militia is a power afterwards expressly given, and therefore not to be implied. When expressly given, it is expressly given to be exercised on emergencies only connected with the safety of the State. And it is not by implication to be inferred for other occasions, disconnected with that object from the force of a term which cannot without compulsion be taken in such sense. To govern, naturally means to rule, to regulate, to manage, to restrain. It consists in keeping the powers on which it operates in quiet subjection according to some known and usual course of things, and not in disturbing that course to bring them into extraordinary exercise. The terms to "train and exercise" the militia might far more forcibly have been argued to imply the power to call them out at pleasure.

But the Respondent insists that a final limit to this power of training, exercising, and governing the militia in time of peace, is positively expressed in this very section of the constitution, which concludes, that the governor is entrusted with these and other powers to be exercised agreeably to the laws of the land, and not otherwise; that is, not otherwise to be exercised at all;—and also by that article of the Bill of Rights which declares, that armies shall not be maintained in time of peace without the consent of the Legislature, and that the military power shall always be kept in exact subordination to the civil authority and be governed by it. Does the civil authority in this connexion mean the governor alone, or does it mean the Legislature, without whose consent an army cannot be maintained, together with the governor and council? If the latter be the civil authority of the State by which collectively the military power is to be governed, according to this clause of the constitution, does it not follow, that the other clause which gives the governor power to train, instruct, exercise, and govern the militia in time of peace, agreeably to the laws of the land, and not otherwise, means, as the Legislature shall from time to time direct? If not, and the power to train, and govern the militia is the exclusive right of the governor, secured to him by that constitution which provides that the legislative department of the government shall not infringe upon the powers of the executive

authority, and if this exclusive right is to be exercised according to his own pleasure only, and not at the times and in the manner the Legislature shall from time to time prescribe, it follows that the Legislature have passed numerous acts which are wholly unconstitutional and void, namely, all those acts expressly entitled "acts for *regulating, governing and training* the militia of this Commonwealth," in which it is enacted "by the Senate and House of Representatives in General Court assembled and by the *authority of the same*," that certain things shall be, and that certain other things shall not be, which upon the theory of the Prosecutor's construction belong exclusively to the executive control.

But, says the Prosecutor, "the power to govern and control the physical strength of the country must exist somewhere;" to which the Respondent assents; "by our constitution he adds, it is vested in the governor," (to which the Respondent does not assent,) "and no act of the Legislature can take it away. If they can control the manner of its exercise, this, to say the most, is all they can do." Does not this admit on the part of the Prosecutor a power in the legislature to *control the military power* of the governor *in the manner of its exercise*? and yet the prosecutor elsewhere asserts that any law that should attempt to *limit that power* would be repugnant to the constitution. As if it were no limit of absolute power to control the manner of its exercise?

The Respondent on the other hand humbly insists, that to govern the militia in time of peace "agreeably to the laws of the land," includes the power to call out the militia only at those times and for those purposes which the laws of the land shall prescribe; and that the Legislature having prescribed times and purposes upon which the militia are to be called out, the governor is without power to call them out at any other time or for any other purpose whatever, except on the emergencies named in the constitution. If the *right* to call out at other times exist, it is admitted there is an *obligation* to obey.

But how is that obligation to be enforced? The penalty for neglecting or refusing to appear, created by legislative enactment, is a pecuniary fine to be sued for in the civil courts; but it is expressly affixed to neglect, or refusal to appear only on the precise occasions prescribed by the statute for military service; none is affixed to a refusal to obey the call of the governor, unless in times of danger and emergency; and no action could be maintained under the statute for a forfeiture incurred

by a member of the militia upon any occasion to which that forfeiture was not previously affixed.

There is then no remedy by action in the civil courts for refusal to obey an order for escort service, and consequently no means to compel obedience to such an order unless by martial law, which cannot constitutionally be exercised in time of peace, but by authority of the legislature. The 28th article of the Bill of Rights heretofore cited, is express upon this point.

But the Legislature have given no such authority for the exercise of martial law in compelling obedience to orders from the executive in time of peace, and they have provided no Civil penalty for that case. There are then no means whatever created under the constitution and the laws of the land by which such an order can be executed, unless it be by purely voluntary service. Is it then not idle to contend, that a legal obligation exists, when it must of necessity be admitted, that there is not a shadow of law in the land to enforce it? Is it not equally idle to contend that a legal right exists to issue an order which there is not a shadow of legal obligation to obey? Is there any pretence for arguing that such an order is a legal order, or that it is in any sense, legal or military, an order, if it carry with it no force, and demand no obedience? It is yet more idle to argue that a commander of a company is bound to call out his men whenever required by a superior officer, admitting at the same time that his men are not bound to obey. It is in effect arguing that the commander of a company is legally bound by the illegal order of his superior to issue an illegal order himself to those not under his command for such a purpose.

The Respondent, in submitting his motion to the court, after exhibiting his views of the constitution as not granting to the governor the right in question, proceeded to show that the statutes of the commonwealth had not extended the constitutional power of the executive. The Prosecutor in his answer, treats the statutes referred to by the Respondent as if cited by him, merely to show some *legislative restraint* on the constitutional power of the governor, and proceeds with elaborate acumen to demonstrate that no such restraint is contained in the Statute Book. This part of the argument might well have been spared, because it proceeds upon a total misapprehension of that used on the part of the Respondent. If the Prosecutor's construction of the constitution were admitted by the Respondent, he would also admit that it was not competent for the legislature to restrict the governor in the exercise of powers

granted by the constitution. If the Respondent's construction on the other hand be correct, the powers given are expressly made subject to legislative control, and powers not given by the constitution (of which the right to order out the militia in time of peace is one as the Respondent insists) might nevertheless be given by legislative grant. The whole object therefore of the Respondent in examining the statutes, was to see whether the power in question had been granted by the legislature. And upon this view of the Statute Book, he contended that the constitutional powers of the governor, such as they were in his opinion, over the militia (of which that of calling out the militia in time of peace, it will be remembered was not one) were rather limited than extended by subsequent laws. His language was, we find, "limitation only, and not extension in the acts of the legislature." In illustration of this remark, a statute was cited, giving to the governor, *with advice and consent of council only*, the organization of the militia; whereas, if he were an absolute and unlimited commander in chief of the militia, by virtue of constitutional prerogative, it was supposed that the right of organization would have belonged to himself, without the advice and consent of council. In answer to this illustration it is said, that "it did not perhaps occur to the Respondent that this is a civil and not a military power." If so, the Respondent admits that his argument fails as to the supposed limitation of the executive power in the particular case; but not so his argument, that the acts of the legislature show no new grant or extension of military power to the governor, including the right to order out the militia in time of peace, which was the main question, and in truth the only one of moment, according to the Respondent's view of the constitution. To prove the power of organization to be a civil, and not a military power, the Prosecutor fairly argues that the organization under the statute referred to, was not made in pursuance of any provision in the state constitution, but by the authority derived under the 2d Sec. of the Act of Congress of 1792, expressly referring the organization of the militia to the Legislature of each state. The Respondent therefore being always happy to acknowledge a fair and just argument on the part of his opponent, although it may be somewhat aside from the main question, most readily admits that the organization of the militia under the particular statute referred to, was in that instance a civil and not a military power, because it had been referred by Congress to the Legislature and not to the executive. But it did not perhaps oc-

cur to the Prosecutor, that long before the act of Congress in 1792, namely in the repealed Statute of this Commonwealth of 1784, Chap. 55, Sec. 3, and subsequent acts upon the same subject, since repealed, the legislature did by virtue of their own constitutional power, act upon the organization and arrangement of the militia of this commonwealth, organizing it in part themselves, and referring it in part to the governor and council. Now the argument of the Respondent is this; that the supreme head of a military force over which he has constitutionally unlimited control, has power to organize and arrange that force at pleasure; that the power to *govern* the militia as expressed in the constitution, more particularly includes this power of arrangement; consequently if the Prosecutor's construction of the constitution were correct, and the military powers therein given to the governor were to be exercised according to his own will and pleasure only, and not as the legislature should direct, the power of arranging and organizing the militia before that power was ceded to the United States would have belonged to him alone, and the legislature could not constitutionally have acted upon the subject. The act of 1784, therefore before cited, shows that the constitution soon after its adoption, was not interpreted as the Prosecutor now contends that it should be interpreted. For nothing is more clearly expressed in the constitution, or with less qualification, than the governor's general power to govern the militia; nothing is more clear than that the general and unlimited power to govern, includes the power to organize and arrange; nothing is more clear than that the legislature professing to act under their constitutional authority did nevertheless from the beginning of the government direct the organization and arrangement of the militia, and that where they referred any part of that duty to the executive department, it was to the governor and council, and not to the governor alone. This act therefore, and other similar acts are evidence that the legislature have exercised under the State constitution, the right of limiting even the express powers of the governor, as upon the Respondent's construction of the constitution they well may; and his original position that the acts of the legislature show limitation rather than extension of the governor's general military power, stands fully maintained.

The Prosecutor then proceeds to say "that the Respondent cites the act which invests the executive, or governor and council, with the power of appointing officers, as another case

in which the Legislature have limited the constitutional power of the commander in chief by requiring the concurrence of the council in the exercise of that power," and proceeding to show that this enactment is exactly in accordance with the language of the constitution itself upon the same subject, concludes that his "respect for the learned advisers of the Respondent forbids him to suppose they would have permitted him to use this argument, if the constitutional provision he had cited had occurred to their recollection." The error of the Prosecutor here as elsewhere lies in the first step, and if he will take the pains to review the Respondent's argument, he will find nothing in it to indicate that this statute was cited for the purpose supposed. The Prosecutor himself in this instance ingeniously creates the error which he so triumphantly exposes. The statute in question is cited without comment, in the course of a review of the several statutes respecting in any way the military authority of the governor, for the purpose of illustrating the Respondent's main position, that if the power to call out the militia at pleasure was not given to the governor by the constitution, it is not given by any subsequent law.

Having thus satisfied himself that the Respondent had failed to show by any of the statutes cited, the smallest restraint upon the constitutional powers of the commander in chief, a point by the way which the Respondent had incidentally undertaken to establish upon one of the statutes only, and which was quite unimportant to his main purpose, the Prosecutor proceeds to point out on his part several acts of the legislature in which the existence of the right to call out the militia for escort, is supposed to be directly or indirectly recognised. And for this purpose he begins with the Act for the suppression of tumults passed 20th Feb. 1787, at the time of Shay's insurrection, a time, as he justly informs the court, "of great public danger and calamity," "and if therefore," the argument proceeds, "the Legislature had not already seen the power (to call out the militia) already existing in the governor by the constitution, they would at once have invested him with it;" as if it had ever been contended by the Respondent that the governor had not, by the very letter of the constitution, full power to assemble the militia in warlike array for the special defence and safety of the commonwealth, and to establish martial law in time of rebellion, declared by the Legislature to exist.

The 2d Section of the act of June 20, 1798, is now cited, making it unlawful for officers in the militia to call out their

men, or to exercise any military command, on certain days of election, "unless in case of sudden invasion made or threatened, or in obedience to the orders of the commander in chief," and upon this it is argued, that "the statute not only recognises the power of the commander in chief to order out the militia, but recognises it as existing in full power on days when all other officers are prohibited from its exercise under and by virtue of their own authority alone." But this statute gives no description or definition whatever of the occasions upon which the governor may call out the militia, and therefore furnishes no comment on the letter of the constitution. It only provides that the militia shall not be trained on certain days of election, "unless in case of sudden invasion made or threatened," (on which occasions the citizens of this commonwealth, it is presumed, may lawfully assemble in arms with or without orders) "or in obedience to the orders of the commander in chief," who by the letter of the constitution may lawfully issue such orders, not only in time of invasion made or threatened, but in time of rebellion also, or "upon any other occasion of need for the special defence and safety of the commonwealth.

Statute 1809, Ch. 108, Sec. 14, is also cited, which provides an allowance to artillery companies for the expense of procuring horses. In this, as we are informed, "there is a proviso full of import." The proviso is, "that no such allowance shall be made unless such company is ordered to appear at a battalion, regimental, brigade, or division inspection or review, or to march out of the town in which the gun-house of such company is *situated*, or unless such company is ordered on duty by the commander in chief." This section, says the Prosecutor, "obviously has no relation to invasion or other emergency, nor does it in any degree restrict the right of the commander in chief to order the artillery on duty at his discretion. It must therefore be applied to ordinary occasions of salutes, escorts and public celebrations from its connexion with its other provisions."

But the Respondent respectfully submits to the court that this particular provision is not connected with any other provision in the statute having the least bearing on the subject. It is a totally independent enactment. That it does not in any degree restrict the constitutional right of the governor, whatever it may be, the Respondent very cheerfully admits, but he is absolutely at a loss to perceive how it follows, that because the statute does not *restrict* the governor's authority as described in the consti-

tution, it must therefore be intended necessarily to apply to occasions of salutes and escorts. Has not the governor express power under the constitution to order out the whole militia, artillery included, for the safety and defence of the commonwealth?

If he has this power expressed, and has not, by the terms of the same constitution, power to order out the militia for any less important object, then the orders referred to in the statute can be held only to mean such orders as may be issued by the governor upon a constitutional emergency.

So the statute of March 2d, 1815, cited by the Prosecutor as showing the power of the governor, or of a major general, ordering a court martial, to order a military guard to attend it, supposes a case of emergency, and is therefore quite inapplicable to the point in issue. This statute, instead of empowering any officer to order such a guard, expressly forbids it, "unless it be necessary for the protection of the court;" and if it be necessary for the protection of the court, a case of tumult and insurrection has arisen, then the militia may well be ordered out for the special safety of the commonwealth. Upon no other occasion does it either create or recognise an obligation on the part of any man to obey the order for such duty.

Article 7th, Sec. 32, of the same statute is also cited, its words are "Every captain or commanding officer who shall either refuse or neglect to call out his company as often as, and at the times required by this act, or at any other time when thereto required, by his superior officer, shall be liable to be tried by a court martial."

The times required by the act are the 1st Tuesday of May, and three other times when the companies are to be called out by the order of the captains on their own authority, and the words "or any other time when thereto required by his superior officer," must necessarily mean when lawfully required, as for the purpose of a battalion, regimental, brigade, or division review or inspection; or when required in pursuance of an order from the commander in chief upon some occasion of public emergency. If this be not the construction of the law, it follows that every field officer in the commonwealth has the same power to order out a portion of the militia at his own pleasure, that the commander in chief is supposed to possess. A colonel in this case might with as much authority as the governor order out his regiment every day in the year, and his captains, according to the Prosecutor's reading of the law, would be bound to obey this daily call on penalty of a court martial,

although, as has been heretofore shown, their men can in no way be compelled to answer the call.

The answer of the Respondent still is, that commanders of companies can never be obliged to issue orders that their men are not bound to obey; and he would add that the practice of issuing such orders if indulged in, and not carried into effect by voluntary service, would be absolutely subversive of all military subordination and discipline and become effective means of bringing our whole system of militia into ridicule and contempt.

The statute of 1822, Chap. 102, Sec. 1st, providing "that captains of companies shall parade their companies by their own order on one day in the year, and no oftener," expressly limits, as the prosecutor contends, only the number of trainings which the captain has a right to require *by his own order*, and is therefore supposed to have implied the existence of an obligation on the part of the officer to call out his company at any time when required by his superior.

This might be true, or at least would be fairly argued, if the words above cited contained the whole provision of the statute; and the statute would have stopped there if that enactment had been its sole object; but the entire language is, that captains, &c, shall parade their companies by their own order on one day in the year, and no oftener, "in addition to the company inspection in May, and the brigade regimental and battalion reviews, as now established by law." Does not this plainly import that the men are to be called out no oftener than once a year by the captain's order, added to the May inspection and one annual review, when they are not called out by the captain's own order. Why does the law say that captains shall parade their companies by their own order on one day in the year and no oftener, in addition to the annual inspection, when they are not paraded by their own order, but by order of law, and the annual review when they are not paraded by their own order, but by order of some superior officer, if it did not mean to exclude any other times when captains might order their companies to parade, either of their own authority, or in pursuance of the order of a superior officer? The Respondent therefore insists, that this statute is a restrictive statute, as plain and express as language can make it, forbidding captains of companies to order out their men, whether unlawfully required by a superior officer to do so or not, on any other than three specified occasions; namely, once by their own order; once on the 1st

Tuesday of May by order of law ; and once for the purpose of review by order of the superior officer ; and that since the passing of that statute no obligation exists in the militia, even if there were any before, which the respondent does not admit, to obey any order for military service upon any other occasion, except it be an occasion of emergency and for the safety of the commonwealth. He contends that this is the true and unavoidable interpretation of the enacting clause ; — but, as if yet further to remove all possibility of doubt as to the extent of the duty, the Legislature have added a proviso which is indeed “ full of import,” it is that “ nothing herein contained shall be construed to *prevent* any company from meeting for the purposes of drill, funeral service, escort, or *other voluntary service.*” The whole effect of the statute therefore taken together is this, commanders of companies shall not require their companies to parade, either by their own order, or in pursuance of any superior order, on more than three occasions in the year, namely, once for company discipline, once for general inspection, and once for a brigade or other review, provided that companies shall not be prevented hereby from meeting if they please, although they can not be required so to do, either for drill, funeral service, escort, or any other voluntary service, and yet in the face of this statute it is contended that escort is not a voluntary service.

We now arrive at a passage in the Prosecutor’s argument which deserves a pause, as well because it contains the only citation which seems to countenance his doctrine, as because it contains a pretty remarkable commentary on the law. The citation referred to is of a resolve of the Legislature, of June 21, 1811, in the following words, “ Resolved, that whenever the commander in chief of the militia shall direct any militia company, or other corps, to perform escort duties, that the commanding officer of such company shall present his account for necessary music to the quarter master general, by whom the same shall be discharged out of the commonwealth’s moneys in his hands.”

The Respondent admits, that the particular Legislature which passed that resolve, at the hasty close of a summer session, probably acted under the belief that the commander in chief had power to order an escort. If he had not such power however by virtue of the constitution, he has not acquired it by virtue of that resolve. The resolve does not purport to create a power ; it can only be argued upon as recognising a power supposed to exist. The mistake of the Legislature in this particular in no

degree alters the case. If the power did exist it was by virtue of the constitution; and that Legislature were no more qualified to give an authorized interpretation of the constitution than the Prosecutor is. It is a judicial question wholly. The Legislature is not competent to declare what the law is, although they may make the law what they please within certain limits; nor is it at all probable that the constitutional question was brought to the notice of the Legislature at all at the time they passed that resolve. The Respondent insists, therefore, that if his interpretation of the constitution is the true one, and escort service is, as the statute of 1822 expresses it to be, a voluntary service, the resolve of 1811 can be construed only as a legislative provision to pay the expenses of necessary music, whenever that voluntary service shall have been performed in behalf of the commander in chief; besides which, it is in effect repealed, so far as any supposed obligation to do escort duty is implied in its language, by the subsequent statute of 1822, forbidding captains to require a parade of their companies oftener than three days in the year, though permitting the companies to assemble for escort, if they please, as a voluntary service. This strict construction, confining the resolve to its true purposes, the Respondent can hardly expect the Prosecutor to admit, considering the liberal view he has taken of it himself in the following words. "If this resolve required any comment, it would be, that under its provisions the quarter master general had paid the bill of the musicians employed by the Respondent on this very occasion, and charged the same, and the expense of a collation which, as usual, was provided at the State House for the Company, on similar occasions, to the Government, and has settled his account, and exhibited his vouchers, *for these particular items*, to the committee who were appointed to examine his accounts."

This commentary is a felicitous example of that liberality in the construction of military powers which so peculiarly characterizes the whole argument in behalf of the prosecution. We can hardly be surprised that the same broad principle of interpretation, applied to the general power of governing the militia for purposes of state, should at pleasure deduce the right to require a personal escort of honor, which when applied to the resolve in question detects the latent power of providing a collation under a specific appropriation of the public moneys *for necessary music*. The fact seems to be stated by the Prosecutor with some triumph as an argumentum ad hominem; as if the

Respondent, having partaken of the bounty under this resolve should be the last to deny its obligation. But the Respondent assures the Prosecutor that this argument is utterly unavailing, as he can feel neither satisfaction nor gratitude at having been made the involuntary instrument of such a misapplication of a legislative resolve, and he desires here to enter his protest in case of any future inquiry into the transaction, that he was wholly ignorant by whose order or under what law the collation was provided. And as the Prosecutor has thought proper to invoke the shade of the Respondent's ancestor to inquire "what he would do" if he were present to hear the legal exceptions submitted by him to the court, may not the Respondent ask in turn, what would have been the admiration of that revered ancestor of the Prosecutor, who for so many years adorned the bench of the highest judicial tribunal of the state, if he had been present to hear such an interpretation of the law from his descendant?

As to the particular occasions next referred to by the Prosecutor, when troops have been called out in some considerable number by order of the executive, it will be found upon examination that in almost every instance it was done, either under a resolve, or by reason of some request from the Legislature. The order of the 22d of Feb. last, referred to by the Respondent in his former argument, was, as appears by the official certificate of the clerk of the Senate, since obtained, of the latter character, and not, as was supposed when referred to, a resolve; and it is admitted that legislative requests have not the obligatory force of law. They are assurances, so far as the Legislature for the time being can give such assurance, that the expenses of the service shall be paid, and that the executive shall be sustained in the execution of the request; but they leave the service itself as purely voluntarily as it was before. The Respondent does not deem it necessary to review the instances of orders for escort referred to by the Prosecutor for the purpose of showing how many of them have been by authority or request of the Legislature, because he admits that they have often been issued without such authority or request, and although it be true that a military parade was had at the same time that a silver chain was presented to each of the Osage Chiefs, and that 5000 troops were assembled upon Boston Common, and that 700 of them dined under one tent, on the occasion of the Lafayette review, the facts do not seem to have much bearing on the constitutional argument. The truth is, that services of this extraordinary description have been called

for only upon occasions when the citizens were ready to volunteer such services ; so that their performance furnishes no test of obedience, no admission of obligation, and no argument for the right. And so in respect to orders for escort to the Independent Company of Cadets ; it has ever been a greater source of gratification to the corps to have performed the service, than it can possibly have been to the executive that it was performed. And although orders issued by successive governors for a series of years might at first seem to afford some evidence of *their* judgment upon their constitutional right to issue such orders, yet it is matter of notoriety and must be well known to the court that the governor in point of fact has more important avocations pressing upon him daily than the regulation and ordering of military parades ; and that his supposed powers in that particular are usually carried into exercise by subordinate officers, whose particular duty it is to attend to the business of the militia ; that what has been practised by one officer in this respect is of course practised by another, until some occasion arises when the principle is questioned, and none such having arisen, the practice of the government affords no evidence even of the individual opinions of the respective governors on the construction of their own constitutional powers. Still less can it be taken as a legitimate exposition of the meaning of a written document. In respect to the obligation arising from an undertaking to perform a service which before was voluntary, the Prosecutor relies for aid on the 21st, 22d, and 23d of the articles for the regulation of the militia not in actual service. The 21st, and 22d, of these articles provide that any non-commissioned officer or private who shall " while under arms or when on duty " behave himself with contempt to an officer, &c, or " who shall without leave of his officer quit his guard, section, platoon or company," shall be subject to a forfeiture ; but the Respondent cannot admit the Prosecutor's inference that these provisions are intended to cover as well occasions of voluntary service as occasions of military duty. How can such an inference reasonably be drawn ? This statute expresses nothing about voluntary service. It had previously provided for putting the militia under arms on certain prescribed occasions only ; and it then provides that " while under arms or when on duty " certain forfeitures shall attach to certain misconduct. The Respondent therefore insists that these terms necessarily mean " while under arms," *by virtue of some lawful authority, or when on duty as therein prescribed*, which is the same thing ; and that it would be a complete bar to any

action for a forfeiture founded on this statute to show either that the defendant was not on duty at the time when the offence was supposed to have been committed, or which is the same thing, that he was not under arms by virtue of any lawful authority, but solely of his own free will and during his own pleasure.

In respect to the 23d of the same articles, which provides that non-commissioned officers and privates shall be liable for certain misconduct while going to or returning from the place of parade, it proves only that the Legislature may, if they please, create a new statute offence, and make it culpable for any member of the militia to do a certain act when not on duty, which otherwise he might lawfully have done. The very creation of a penalty for these acts by express enactments goes to prove that men in the militia service are not liable, when there is no express enactment, for what in the regular service would be unmilitary conduct and punishable as such, even without any express regulation. So the Legislature might, if they had pleased, have fixed a penalty for disobedience of orders for escort service, or for unmilitary conduct while on that service, and thus by force of the statute have turned a service now voluntary into a duty. They might have so done : but they have not, so that as the law stands, no private in the militia is liable for disobedience, neglect, or unmilitary conduct on such service. And the same principles of construction applied to the case of an officer produce the same result.

Mr President, so much time has necessarily been taken up in answering the objections of the Prosecutor in detail, that the Respondent begs leave for the sake of greater clearness to briefly recapitulate what he considers to be the argument as it stands unaffected by those objections. The question immediately before the court is, whether the government has authority to *order* the Independent Company of Cadets to perform escort duty on Election day ; a question not very important certainly, while thus limited, either to the people or the executive ; for the Respondent admits that there is as little probability on the one hand of any practical abuse of the power of ordering out a complimentary escort, as there is on the other of any real peril besetting the commander in chief in his progress from the State House to the church which might require military force for the protection of his person. But the most important questions of right have often been settled on the most trivial occasions. The demand of a trifling tax has, both here and in other countries, arrayed a nation in arms, and been the occasion of revolutions

by which the liberties of mankind have been effected for centuries, and as nothing can be more dangerous to the liberties of the people than an acquiescence in unimportant encroachments on constitutional right, the present question assumes in that view an importance that does not belong to the case in which it arises.

It will not be denied that the power claimed, if it exist, must be found among those conferred by the constitution directly on the executive, or by some law of the state, which the Legislature is authorized to make. All the powers of government are derived from the constitution, as an original social compact; and they must be found plainly conferred by the language of that instrument according to the usual meaning of the words, or by some *necessary* implication, without which the power expressly conferred could not be exercised. It is not denied that the general powers of legislation granted to the General Court, are sufficient to enable them to confer this power on the governor, but without repeating what has been already said in detail, it is enough to say that such a law must be clear and express, and that no such law can be found. A resolve of the Legislature founded on the supposition that the governor has that power, is neither proof that such is the true construction of the constitution, (for the Legislature are forbidden thus to exercise the judicial power of interpreting the constitution,) nor sufficient to grant it; for such a grant cannot be by any but direct language, or by such implication as necessarily shows an intent in the Legislature to confer a power not enjoyed before. A legislature may pass a resolve under a mistake, or in ignorance of the meaning of the constitution, without violating any maxim of our government.

In one view of the question, the Respondent is happy to agree with the Prosecutor; and that is, that if the power exist, it is to be found in the words of the constitution itself; that it must be sought in that clause of the constitution, declaring the governor commander in chief of the militia, captain general of the army, and admiral of the navy. By the adoption of the constitution of the United States, these latter offices are abolished, and the question must turn entirely on the meaning of the words applicable to the office of commander in chief of a militia not in actual service.

The powers of this description given in that clause are to *train, instruct, exercise* and *govern*, and to *exercise the other powers* incident to the office of commander in chief of the militia, (not in actual service) agreeably to the rules and regu-

lations of the constitution and the laws of the land — *and not otherwise*. As to the words *train, instruct* and *exercise* it is obvious that they are intended to confer no other power, than that of *instructing* the militia by *exercise* and actual *training*. Instruction by theory and practice is the whole object of the words ; no sophistry or ingenuity can extend them to any occasion of mere honor and compliment, unless the object is instruction. It cannot in the present instance without a manifest subterfuge be pretended, that to order out a company as a personal escort of honor to accompany the governor in his civil capacity from the State House to the church is a measure of *military instruction*. Can it be suggested that it is done for the purpose of perfecting the company in its discipline ? Such a suggestion would be simply a falsehood ; it is contradicted by the very words of the order. The officer escorted does not train the escort ; on the occasion in question he was not present in a military capacity, nor even in a military dress. He was acting as the civil governor of the State in the costume appropriate to that office.

The Prosecutor seems sensible of the impropriety of applying that provision to the present order, and founds his whole argument on the word *govern*. The governor shall have full power to govern the militia agreeably to the laws and not otherwise ; these words it is contended give the executive the right of calling out the Independent Company of Cadets for escort duty on Election day. If so, it must be because they give the governor unlimited and indefinite military power over the whole militia ; for there is surely nothing in this word *govern* peculiarly applicable to escort duty, or to the particular day, or this particular corps. But has the word *govern* any such extensive meaning ? How is it used in other parts of the constitution ? The executive is called the *Governor* of the *State*. In what sense of the word does he govern it ? In the sense contended for in the present case ? Does it mean that he is the absolute ruler, except so far as he is restrained by positive law ? Certainly not — it means only that he is the person to execute the laws which the Legislature shall make, and to exercise the other general powers conferred in terms by the constitution. Such is the only meaning of the word, consistent with the spirit of a free constitution. The power then to govern the militia, is the power of executing the laws relating to the militia. To *govern* is not a military word, and does not import military command ; it relates to the organization and regulation of the

militia. It has already been remarked that the power of arraying them in the field is given expressly by *other* words in the same clause and under certain restrictions. This phrase means only that he is to be the head of that department. It was not intended by it to specify the powers to be exercised by him as such, but only that he should be the *person* to exercise the powers over the militia that should be created by law. It is confidently submitted to the court that this is the only natural import of the word, and the one contended for by the Prosecutor is a forced construction, adopted to make it cover the ground of the present controversy. It is matter of surprise to the Respondent that the Prosecutor should have selected this word, as the one on which to rest his argument; as it appears to the Respondent the one least adapted to convey the notion of a purely military power, such as the one now contended for. It is a word exclusively applied to civil control. A father is said to govern his family, a master his servants, a ruler his people, and although a chieftain may sometimes be said to govern his army, the word in such a case does not mean directing their military operations and movements, but their police and discipline. Such is the sense in which it is used here. To govern the militia is to preserve the order and due organization of the *system*, not to command them on actual duty. There is one other clause under which the supposed power may be said to be conferred, viz. that of "exercising the other powers incident to the office of captain general and commander in chief."

What are these incidental powers? That must be determined by considering the nature of the office to which they are incident. If the governor were the commander in chief of a standing army, there would be some doubt of his incidental rights to such an escort in time of peace. It is not usual for even such an officer to be so attended. There is indeed no limit to the power of such an officer in commanding any military service from his troops; but still an escort of honor is not a customary appendage of his office. The use of an escort in actual service is confined to cases of actual danger. Would it be tolerated here if General Macomb should travel through the country, or in England if Lord Hill the commander of the British forces should habitually traverse the streets of London with an armed escort? Yet if done on one occasion because it is a right incident to his office, it might be done every day that he holds the office. In time of peace, an escort is not an appendage of military but of regal rank. So here, the right to an escort of hon-

or may be incident to the powers of civil government (how appropriate to our republican institutions it is unnecessary to inquire) but not to the office of commander in chief. But how different is the case of the commander in chief of a militia not in service from that of the head of an army.

The whole object and design of our militia system is such arming, organization and instructing as may qualify the citizens to defend their country, and their civil liberties, in cases of emergency. The whole system is one of pure utility, and professes to be regulated by the principles of imposing on the people as few burdens as possible, consistently with the attainment of its useful ends: on what pretence then can it be said, that the power of ordering out an escort of honor in times of profound peace, is a necessary incident to the office of commander in chief of such a militia? What one useful purpose of the *militia* is subserved by this power? What one would be impeded or defeated by the want of it? Nothing can pass as an incident to power, but that which is necessary to its useful and proper exercise. How can this reasonably be said of this right to a ceremonious escort as applicable to the *express* power granted by the constitution to the head of the militia in time of peace? If it cannot, then the power may be safely denied to exist. When the civil government think a military escort necessary for their dignity, or for that of the governor, they have a right, undoubtedly, to require it by passing a law to that effect.

But further, all the powers over the militia granted to the governor by the constitution are to be “exercised agreeably to the rules and regulations of the constitution and the laws of the land, *and not otherwise.*”

This provision may be construed either to mean that these powers are not to be exercised by the governor in any manner repugnant to the laws and constitution, or in such manner only as shall be prescribed by law and not repugnant to the constitution. That the latter is the true construction appears quite manifest. For it would be little less than absurd to confer powers by the constitution on one branch of the government, and empower another to abridge or take them away; whereas it would be according to the whole analogy of the constitution to authorize the Legislature to assign to the executive the particular mode in which its duties shall be performed, as is done in the case of the judiciary. General provision is made in the constitution for a proper judicial department, but the whole organization of it and the appointment of its duties are devolved

on the legislature. The language of this proviso too, respecting the military power of the executive, is similar to that used in giving power to the governor and counsellors to hold a council for the ordering and directing the affairs of the commonwealth "agreeably to the constitution and laws of the land ;" no one can suppose a general power to govern the commonwealth at discretion, except so far as it may be *limited* by law, is conferred by this provision. But the proviso relating to the military power is even more clear, for it is to be exercised agreeably to the rules and regulations of the constitution and the laws of the land, *and not otherwise*. Such has been the practical construction of it. The clause in question gives the usual power to the governor by himself or any other officers to train and exercise the militia ; but the Legislature has from time to time passed laws prescribing the number of days on which the militia shall be called out for exercise by companies and larger bodies ; and it was not thought necessary to provide in any of those laws, except the last, that the militia should not be called out oftener than therein prescribed ; yet it has always been understood that the militia could only be called out on those prescribed days. Such was the settled law before it was so expressly provided in the statute of 1822, that is, that the militia could not be called out to be trained or exercised at any time not authorized by law ; it must be *according to law and not otherwise*. If this construction be true, it follows, that the governor has, except in the cases of constitutional emergency, no power whatever to call out the militia, or any part of it. Provision has been made by law for calling them out by companies, regiments and brigades, by orders of the commanding officers, as often as the Legislature deems necessary for their instruction and discipline, and although the governor might on any of those occasions attend, and himself train and exercise the militia, or have it done under his inspection, he cannot call out the whole, or any part of them, at any other time for those purposes. If he can call out a part, he can certainly call out the whole, for he is commander in chief, and the whole militia of the state is his appropriate command. But will it be pretended that he could by general orders assemble the whole militia of the state, from Martha's Vineyard to the extremity of Berkshire, to meet at Worcester for a general review ? If he could do it once a year, he could do it once a month ; his power for calling out the militia for mere exercise or parade, if it exist all, is indefinite and absolute, for there is no law restraining it. And this is the great and insuperable objec-

tion to the existence of the power that is now claimed. The Respondent asks by what warrant of law the governor can order out the Cadets on Election day for escort duty — and he is answered, that by the constitution the governor is commander in chief of the militia, and is empowered to govern it. Is it not obvious that this is no authority for any exercise of power, unless it be authority for the exercise of an unlimited power? Does not the Prosecutor perceive that it proves too much? that it proves a power inconsistent with the constitution, or that it proves nothing? Even if the call had been for the *purposes* recognised by the constitution, for *training* and *exercise*, this objection would still be fatal to it, for there is no law either prescribing or limiting such orders by the governor — the power if any, must be as broad as the words of the constitution relied on, and they are broad enough to cover an exercise of the power that would differ in nothing but name from a conscription and a standing army.

Mr President, — The Respondent asks by what warrant of law he can be compelled to escort the governor on Election day, which would not equally oblige you to wait upon him with your whole brigade, at Worcester, to attend him to the village church, which would not enable him to call out every regiment in the state in rotation to be a guard of honor to his person; to this question he has received no answer in the argument of the Prosecutor. He now asks that question of the learned Judge Advocate; he puts it to him as a lawyer, and an officer of this court, and the question must be answered. If it is not answered here, it will be asked elsewhere, and no decision of the present motion against the Respondent will be satisfactory to himself or to the public, that does not satisfactorily solve, what no accurate and candid mind can fail to feel as a serious difficulty in the course of this prosecution. The Respondent will feel no regret, and he ought not perhaps to be disappointed, to find it completely answered by the Judge Advocate, although that answer has escaped the inquiries of himself and his counsel, but he will feel, and not feel alone, deep regret and disappointment if the question is avoided or denied to be material.

It has been intimated, and may be relied on, that the liability of the governor to impeachment, is a limit to this power, restraining him from an unreasonable use of it. To this there are two objections: First, if the power be given indefinitely and not restrained by any other clause or proviso of the constitution, no use of it whatever is an impeachable offence. It may be a good cause of rebellion, but it is not an offence against the constitu-

tion. The Legislature have indefinite legislative powers, restrained by certain maxims of right. Within those limits the most atrocious oppression may be exercised under the forms of law, — and yet the members of the Legislature would not be responsible, and the laws would be binding until repealed, unless the people choose to rebel against them. The governor and council have the indefinite right of pardon — if they should pardon every criminal convicted, could they be impeached for it? Certainly not — they would but have exercised, however mischievously, a discretionary power, for no use of which are they legally responsible. Now it is manifest that the power contended for here is of the same indefinite character. It is restrained, if it exist, by no provision of the constitution, except those against standing armies and martial law in time of peace. If then the governor raises no standing armies, and exercises no martial law, he may keep the whole militia by turns in perpetual training without any violation of the constitution, as the Prosecutor understands it. How then could he be impeached for any use, however extreme, of this indefinite power committed to him within those limits? The power of impeachment can never be implied to a case of clear discretionary power; it would be unjust by its very terms. Another objection is, that a governor who had abused this power, if it were capable of abuse, would be in a situation not easily to be impeached. The remedy would come too late. The very offence for which he is supposed to be impeachable, might put an ambitious man above all law and enable him to dissolve both the Grand Inquest of the commonwealth, and the High Court of Impeachment, at his pleasure. Whatever be the practical danger of this, such could never have been the theory of the government.

Great reliance is placed on the usage of past times. This has already been sufficiently answered. No lapse of time can, under a free constitution, mature wrong into right. We are enjoined in the constitution to have frequent recurrence to its fundamental principles as absolutely necessary to preserve the advantages of liberty, and to maintain free government. What is this but a constitutional caution that usage is never to be the ground of a violation of its principles? In a matter which can like this be brought to the test of a written law, usage is of no weight, it can never under a constitutional government give any power over the people not given in the constitution. To submit to it would be to return to the exploded principles of European governments, and to abandon the distinguishing characteristic of

our own. A written constitution is made for the very purpose of preventing and correcting the abuses of custom. Where there is no constitution, use soon becomes the mother of slavery. The usage of governors in extension of their own powers is an argument of very little weight against the rights of the people. It has not even been shown that the usage here set up has been brought, but in one instance, before the notice of the Legislature, who are the only body, if there be any, competent to grant rights by acquiescence in wrong.

The argument of the Prosecutor on the point of an obligation to the discharge of duty incurred by a voluntary undertaking of it, does not appear to the Respondent to require much reply. His views of that question have been already stated to the court, and he does not consider them seriously impugned by the Prosecutor's answer. If the service was not one of military duty, the Respondent is still at a loss to know how it can become so by any voluntary beginning of it on his part. He may perhaps by so doing have made an implied contract with the governor to escort him back, for the breach of which he may be answerable civilly in an action of trespass on the case, but he is yet to learn how his voluntary undertaking of an act of courtesy can beget a constitutional power in the governor or create a military obligation on the Respondent for which he is answerable to this Court. The examples put by the Prosecutor are all taken from actual military service, where the party is entirely subject to the orders of his commander without the power of inquiring into his right to give them. The authority of a militia officer and the obligation of a militia soldier are strictly limited by law; and a voluntary militia service is voluntary throughout, as much so as any other act of mere courtesy and respect, rendered by one individual to another.

GRENVILLE T. WINTHROP.

The Court requesting the opinion of the Judge Advocate, he read to the Court, the paper marked (8) as follows:—

(8)

The exceptions of the Respondent to the validity of the general order of the 24th Dec. 1831, have presented two questions for the decision of this court.

1. Had the Governor of the Commonwealth, any legal and constitutional power to order out the officers and privates of the "Independent Company of Cadets," (of which the Re-

spondent was captain,) to perform escort duty on the 4th day of January last, it being the day of General Election, and to detain said company under his command until that duty had been by them discharged?

2. If the captain of said company was, originally, under no legal, or constitutional obligation to obey such an order, yet having voluntarily submitted himself to the personal command of the governor, and having commenced the discharge of the services prescribed by the order, had he a right, at any time, to discontinue that service, and without any other cause than a mere act of his own volition?

These grave and important questions have been argued at great length, and with great ability by both the Respondent and the Complainant; and the court having required the advice of the Judge Advocate upon the validity of those exceptions in which these questions have originated, he now asks leave to submit for their consideration, the following opinion.

Before, however, proceeding to discuss the questions above stated, a preliminary objection ought not to pass unnoticed; because if that objection be well founded, this court have clearly no jurisdiction of the subject matter before them.

The Respondent, in his exceptions, prays the judgment of this court, whether "it is competent for them to hold him amenable to martial law" for any imperfection in the performance of the service, which the general order, before referred to, demanded; and he interposes between himself and the authority and jurisdiction of this court, the 28th article of the Bill of Rights. By that article it is declared that "no person can, in any case, be subjected to law martial, or to any pains and penalties by virtue of that law, except those employed in the army and navy, and except the militia in actual service, but by authority of the Legislature." By this objection, the Respondent manifestly implies, that this court has been constituted according to the principles of the law martial, and for the purpose (should he be found guilty of the charges alleged) of subjecting him to the pains and penalties of that law.

No right of the citizen soldier is more sacredly protected, than that of absolute exemption from every pain and penalty of the *law martial*, when not subjected thereto by the authority of the legislature. But, on the other hand, no distinction is more fully recognised, or upheld by stronger authority, than that between the *law martial* and the *law military*. Martial law cannot exist but by special enactment of the legislature. Military

law may exist either by special statute, or by well recognised precedent. Martial law has no existence in this Commonwealth, though there is a power in the legislature to call it into existence. But there has not been a day since the adoption of our constitution, when military law did not exist, and offences against it are the subjects of constant animadversion in the courts. In all these cases, however, the soldier, or the officer is tried, not by martial, but by military law. Since the first colonization of this country, neither in Great Britain, nor with us, has martial law prevailed in times of peace and tranquillity, while military law, during this whole period, had uniformly been exercised in both countries. Where martial law prevails, it exercises jurisdiction by summary trial, not only over all military persons in all circumstances, but it extends to a great variety of cases, which have no relation to the discipline of the army. Even debts are tried by a court martial, thus abolishing the trial by jury, and every species of offence committed by any person who appertains to the army, is cognisable by the military judicature of the regiment or corps to which the offender belongs. Martial law is incompatible with the safety of the citizen, and can never be justified but in cases of extremest peril, and for the purpose of saving society itself from dissolution. Military law encroaches upon no right of the citizen, but on the contrary, has been deemed indispensable to his security, and times of peace are the appropriate season for its exercise.

During the reign of martial law, the privilege of *habeas corpus* is abrogated ; but military law is no infringement upon the benefit of that writ. "Martial law," says Sir Edward Coke, "*in time of peace*, is against Magna Charta." "Martial law, which is built on no settled principles, but is entirely arbitrary in its proceedings, is," as Sir Matthew Hale observes, "in truth and reality, no law, but something indulged, rather than allowed as a law. The necessity of order and discipline *in an army*, is the only thing which can give it countenance, and therefore it ought not to be permitted *in time of peace*, when the courts are open for all persons to receive justice according to the laws of the land."

"Where martial law is established and prevails in any country, (says Lord Loughborough,) it is of a totally different nature from that which by *inaccuracy* is called martial law, merely because the decision is by a court martial." Black, Rep. 69. Were it the object of this court, then, to try the Respondent by martial law, or to subject him, in case of conviction, to any of

the pains or penalties of martial law, as is suggested in his exceptions, the judge advocate would strenuously insist upon the illegality of its institution, and the unconstitutionality of the object for which it had been assembled. But as the complaint sets forth, at most, only a military offence; as this court is convened to try the issue between the commonwealth and the Respondent only, on principles of military law; and in case of conviction, can only award such military punishment as the law allows, it is the opinion of the judge advocate, that this court *has jurisdiction* both of the subject matter, and of the person before them.

Having thus disposed of the preliminary objection, the first question, before stated, recurs for consideration.

Had the governor of the commonwealth any legal and constitutional power to order out the officers and privates of the "Independent Company of Cadets," (of which the Respondent was captain) to perform escort duty on the 4th day of January last, it being the day of General Election, and to detain said company under his command, until that duty had been by them discharged?

This is a question entirely new in the juridical annals of this commonwealth. It belongs to the most difficult class of questions, ever submitted to a judicial tribunal; namely, that class, which involves a construction of the constitution and laws, as to express and implied grants of power. It is not known that any analogous question has ever been raised in any of our sister states; and hence no light from this source is shed upon our path. Hence an entire freedom from error, in deciding so important and difficult a question, suddenly raised as a mere interlocutory matter, during the progress of a trial, is not to be expected from a subordinate tribunal; and when entire accuracy is not to be anticipated, error becomes pardonable. The sources of military powers and military duties, like those of civil powers and civil duties, it is believed, are to be sought in the constitutions, both state and national, which the people have adopted, and in the written laws and the clearly established usages, which they, through the intervention of their constitutional representative body, have either expressly enacted or tacitly recognised and ratified.

In this inquiry, therefore, the constitution of this commonwealth is first to be examined, because by that constitution, the great outlines of power and duty are traced, which may afterwards be filled up, though never transcended, by legislative enactment or recognition.

The constitution is to be regarded as a whole ; but, in the process of examination the powers granted are first to be ascertained ; the exceptions to the grant are then to be determined, and the exceptions, being deducted from the grant, will leave the powers conferred. In the case of *Gibbons vs. Ogden* ; 9. Wheat. 191 ; it is said, “ that exceptions from a power mark its extent, for it would be absurd, as well as useless, to except from a granted power, that which was not granted.”

The first Section of the 2d Chap. of the constitution of this commonwealth provides for the office of governor ; and by the 7th Art. of that section the following distinct military powers and attributes are conferred upon that officer.

1. The governor for the time being shall be the commander in chief of the army and navy, and of all the military forces of the state, by sea and land.

2. He shall have full power, by himself or by any commander or other officer or officers, from time to time, to train, instruct, exercise and govern the militia and navy.

3. For the special defence and safety of the commonwealth, he may assemble in martial array, and put in warlike posture, the inhabitants, &c, and with them encounter, repel, &c, all and every such person as shall attempt or enterprize the destruction, invasion, detriment or annoyance of this commonwealth.

4. He may use and exercise over the army and navy, and over the militia *in actual service*, the law-martial, in time of war and invasion and also in time of rebellion, declared by the Legislature to exist, as occasion shall necessarily require — and

5. He is entrusted with all these and *other* powers, incident to the offices of captain general and commander in chief.

Now what was the plain and natural meaning of the words, used in this grant, at the time when the grant was made. The commander in chief is authorized by himself or by any commander or other officer or officers, from time to time, to train, instruct, exercise and *govern* the militia. He is also expressly entrusted, not only with the specific powers before enumerated, but with all *other* powers, incident to the offices of captain general and commander in chief. In 1780, when the constitution was adopted, the signification of the words “captain general and commander in chief,” was as well understood, as the signification of the word “militia.” They had been long used by the jurists and military authorities of Great Britain. The king was styled the “Captain General” of the military forces of Great Britain, and under this title he held the first rank and exercised the

first powers over the British army, and continued so to do, until in the year 1799, he delegated these powers to the Duke of York. In the laws of the province of Massachusetts Bay, the Governor is not unfrequently styled the *Captain General* and *Commander in Chief*; terms indicating the rank, and comprehending the powers, which he might lawfully exercise under the province charter and laws. Under this title and by virtue of the powers, supposed to be comprehended in it, he exercised authority not only similar to, but far more extensive than, that which has given rise to the present discussion. By his own will, he gave military commissions and took them away. Hence the framers of our constitution, debarred the governors to be chosen under it, from the exercise of this arbitrary power, by pointing out the mode in which military commissions should both be given and revoked. It was under the powers comprehended in this title, that Governor Shirley in 1741, by his own sole authority, chartered the very company of which the Respondent was captain. The language of the charter is,

“ William Shirley, Esquire, Captain General and Governor in chief in and over his Majesty’s province of the Massachusetts Bay, in New England, &c. To Benjamin Pollard, Esquire, Greeting. By virtue of the power and authority in and by his Majesty’s Royal Commission to me granted, *to be*, captain general, &c, over this his Majesty’s province, I do by these presents, constitute and appoint you to be a captain of a company, &c, to be by you enlisted, &c, hereby named ‘The Independent Company of Cadets.’ And in consideration of the dignity of said company, I do hereby constitute and appoint you to be, and to hold the rank of *Lieutenant Colonel* in, &c, hereby commanding them to obey you as their captain, and yourself to observe and follow such orders and instructions as you shall from time to time receive from me as the Commander in Chief for the time being.

Given under my hand and seal the 16th day of October, in the fifteenth year of his Majesty’s reign, anno domini 1741.

W. SHIRLEY”.

It is well known, however, that the governor of the province not unfrequently exercised usurped dominion, and amplified prerogative beyond legal bounds. Hence previous precedents are of less authority than subsequent, and had the former practice of ordering out the militia at will, ceased with the adoption of the constitution, it would have furnished plenary evidence, that the authority of the office of governor had been curtailed. But

after the constitution of this state had been in existence for nine years, and the practice of ordering out escorts had been much more frequent than in later times, the words "Commander in Chief" were again brought before the whole people in their collective capacity. The constitution of the United States was then adopted, and the 2d. Section of the 2d. Art. declares that "the president shall be the *commander in chief* of the army and navy of the United States, and of the militia of the several states, when called into the actual service of the United States." And it is believed, that the most strict and close construction which has ever been applied to his power as "Commander in Chief," has allowed him to march the militia, in actual service, anywhere within the limits of the state in which they had been raised. If in 1789, when the constitution of the United (States) was adopted; these words had been practically found too comprehensive in their signification, why was not their meaning then explicitly abridged?

Upon this point, therefore, the Judge Advocate advises the court — *first*, that where words of a known signification are used in an instrument, and there is no accompanying extension or limitation of their meaning, they should be received in their ordinary sense; and *second*, that the words, used in the constitution, conferring military powers upon the governor of this commonwealth, are almost an exact transcript from the province charter and laws; and that the words "Commander in Chief" have since been used by the people of this commonwealth, when ratifying the constitution of the United States, at a time when they knew that a practical construction had been put upon the same words in our own constitution; and that the governor of the province, under the province charter and laws, and the President of the United States, under the constitution of the United States, have exercised powers, more extensive, than those which were exercised by the governor of this commonwealth, in issuing the general order of the 24th Dec. last. The views here taken and the conclusions to which they inevitably tend, seem to be fully sustained in the 69th number of the *Federalist*. See also "Rawle on the Constitution of the United States," Chap. 13th.

Having examined the grant to learn what powers would have been conferred, but for the limitations, it now becomes necessary to examine the limitations of the grant to learn what powers are possessed.

The first limitation respects the manner in which these powers are to be exercised. The language of the constitution

appended to this grant of powers is, that they are "to be exercised agreeably to the rules and regulations of the constitution and the laws of the land, and not otherwise."—The language of the constitution is not, as it seems to have been apprehended by the Respondent, agreeably to the rules and regulations of the constitution, and the laws of the *statute book*; but *the laws of the land*. And by the 6th Art. of the 6th Chap. of the constitution, it is provided, that, "all the laws, which have heretofore been *adopted, used* and approved in the Province, Colony and State of Massachusetts Bay, and *usually* practised on in the courts of law, shall still remain and be in full force, until altered or repealed by the legislature, such parts only excepted as are repugnant to the rights and liberties contained in this constitution.

The power of the governor, then, is not to be ascertained, by an examination of the constitution alone; nor of the statute book alone; nor of the adopted usages of the country alone; but by all these, taken and construed together, is his authority defined and determined.—They constitute his general commission with specific limitations; and as when the grant was under consideration, whatever was not given was withheld, so when the limitations were considered, whatever was not withheld, and was within the scope of the grant, was given. While, then, the governor confines himself within the *grant*, as ascertained by applying the restrictive to the creative words, and neither practises anything which is inhibited, nor disobeys anything that is enjoined, nor exercises the powers possessed, in any other way, than agreeably to the spirit and forms of the constitution and the laws, his acts are legal and his commands obligatory.

Other limitations exclude a portion of the substance of the power itself, which otherwise would have been comprehended in the grant. The governor is expressly debarred from transporting any of the inhabitants out of the commonwealth, or obliging them to march out of the limits thereof, without their free and voluntary consent, or the consent of the general court, with an exception of those parts of the State to which they could not otherwise conveniently have access.

By the 28th Art. of the Bill of Rights he is disabled from subjecting any person to the pains and penalties of the *law-martial*, except those employed in the army and navy, and the militia in actual service, but by the authority of the legislature.

By the 17th Art. he is debarred from maintaining a stand-

ing army in time of peace without the consent of the legislature. By the 10th Art. of the 1st Sec. of the 2d Chap. the mode in which almost all the officers of the militia shall be appointed or chosen is expressly pointed out, and the mode there prescribed, is, in its nature, exclusive. The same article further provides, that no officer duly commissioned in the militia, shall be removed from his office, but by the address of both houses to the governor, or by fair trial in court martial, pursuant to the laws of the land for the time being.

One further restriction applies to both governor and legislature, that "the military power shall always be held in exact subordination to the civil, and be governed by it."

These are all express limitations, fixed and established by the constitution itself. But the precaution of the wise framers of that instrument did not stop here; in their provident wisdom upon this subject, they endued the legislature with a power of adapting even the comparatively unyielding rules of the constitution to particular exigencies; for by the 4th Art. of the 1st Sec. of the 1st Chap. express authority is given to the General Court "to set forth the several *duties, powers* and *limits* of the several civil and military officers, provided only that they exercise such power in a manner not repugnant to the constitution.

Connected with this part of the inquiry, it is necessary to examine an argument, urged with much strenuousness on the part of the Respondent, relative to the law of 1809, which provides for *organizing* the militia.

The statute of 1809, Chap. 108, Sec. 2, is cited by him to show that the commander in chief with advice of council, (but not without) is authorized to *organize* the militia: And the very sound inference seems to be drawn, that because the legislature conferred this power upon the governor and *council*, they could not have supposed it to exist, by virtue of the general grant of power to train, exercise and govern the militia, in the governor alone. To this the Complainant answers, that the power to organize is a civil and not a military power, and that it is derived from the act of Congress of 1792, which expressly gives that power to the state legislatures, and that our legislature, by the statute of 1809, delegated it to the governor and council. But the Respondent in his rejoinder goes behind the United States law of 1792, and says that by the statute of 1784, Chap. 55, the state legislature conferred the same power in part upon the governor and council, which according to the

plenary powers contended for by the complainant must have been conferred by the constitution upon the governor alone, as the supreme military head.

Upon this point the judge advocate advises the court, that, although possibly, the governor, as captain general and commander in chief might have had the power of organizing the militia; yet, that by the constitution itself, it was expressly taken away; because it is provided by the 10th Art. of the 1st Sec. of the 2d Chap. that, "the divisions of the militia into brigades, regiments and companies, made in pursuance of the militia laws now in force, shall be considered as the proper divisions of the militia of this commonwealth, until the same shall be altered in pursuance of some future law."

By the constitution, then, the governor was expressly debarred from *organizing* the militia; and if by any statutes passed before the adoption of the constitution of the United States, the power of *organizing* it, with advice of council, was given him, still by the adoption of the constitution of the United States, that power was specifically given to Congress: then, by the statute of 1792, Congress delegated it to the state legislatures, and lastly, by the statute of 1809, the Legislature of this commonwealth referred it back to the governor and council. The strength of the Respondent's argument is supposed to consist in this: That the power to *organize* the militia is as much an incident to the office of captain general and commander in chief, as the power to *order them out*; that the legislature of 1784, by delegating the former power must have acted upon the assumption that they possessed it; that if the former power did not vest in the governor, as an incident to the offices of captain general and commander in chief, the latter would not; and that as the legislature had delegated *only* the former, the latter was still retained. This argument, it must be conceded, would be very powerful, were the cases analogous; but the same constitution which created the office of commander in chief, expressly took from him the power to organize the militia; while it left unimpaired (if it were ever possessed) the power to order them out.

This view exhausts the limitations contained in the constitution of this commonwealth, upon the powers vested in the commander in chief by virtue of that instrument; and if the power of ordering out an escort is contained in the grant, it seems abundantly clear, that none of these limitations have taken it away. But the constitution of the United States con-

tains further limitations; and therefore it is necessary to examine that instrument.

The 8th Sec. of the 1st Article, declares, that Congress shall have power "to provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States." This provision, of course, leaves unimpaired the authority to govern them, when not employed in that service. But the identity of the language of the two constitutions is worthy of remark. By the constitution of this commonwealth the governor has full power to *govern* the militia. By the constitution of the United States, Congress has full power to provide for *governing* the militia, when employed in the service of the United States. If Congress, under the word "*govern*" in the United States constitution, could provide for ordering any corps of the militia, in actual service, to perform escort duty; that word in the constitution of this commonwealth, must receive a different construction, or the governor can legally order them out to perform the same service.

By the 10th Sec. of the same Art., the states are prohibited from "keeping troops" in time of peace. This prohibition is general, and must have a reasonable construction. It is supposed by the judge advocate to divest every state in the Union of the lawful power of maintaining military armaments—forces equipped, embodied and encamped in a belligerent or hostile attitude; but that it impairs in no degree the power of the states to sustain the most vigorous militia system, or to call out their soldiers daily for mere purposes of police; nor can it have the remotest relation to those cases where military corps are ordered out to fire salutes, or to discharge the common duties of escort. Were this the case, there would have been a most signal instance of violating the constitution, by the very act of rendering it honor; for by the General Orders of Feb. 9th, 1788, the adjutant general was directed "by the command of the captain general," "to order the Company of *Cadets*, the Light Infantry, the Republican Volunteers, the Fusileer Company, Captain Green's company of Light Infantry, Capt. Spooner's and Johnson's Companies of Artillery, and the Boston and Roxbury companies of Horse, to turn out and parade in State Street in Boston on Tuesday, to celebrate the ratification of the new Federal constitution."—If this construction of our constitutions and laws be correct, the people of this commonwealth did invest their chief magistrate with power

to issue orders, such as those of the 24th Dec. last, and those powers they have never yet resumed

To this conclusion it is objected, that, if correct, it vests in the governor arbitrary and unlimited authority, that the existence of such an authority, is only another name for despotism, and that it is essentially repugnant to the spirit of the constitution and to the genius of our government; — that although such a power, under the happy auspices of virtuous men, might give unwonted strength and stability to the great muniments of freedom; yet, that the people can have no guaranty, that in times of civil commotion it will not surmount all the barriers of the law and rend asunder the frame of society, which it was appointed to protect. Arguments against the possession of a power derived from the possibility of its abuse, are, in doubtful cases, entitled to much regard. They furnish, however, in ordinary instances, rather an auxiliary rule of construction, than a conclusive test. Were it a maxim in expounding our constitution and laws, that no power, which may be abused, is given, there would be nothing left to which any other rule of exposition could apply. And it is apprehended that the argument, as applied to the executive, would be much stronger against the possession of civil than of military attributes. The constitution, for example, makes it his duty to nominate all the judges of all the courts in the commonwealth (with the exception of the Senate when sitting as a Court of Impeachment;) but suppose in cases of vacancy, he should refuse or neglect to nominate; or, for his nominations, should select men, known only for their profligacy and flagitiousness; or, having nominated suitable individuals, should after their nominations have been confirmed, refuse to commission them. It is his duty to nominate the executive officers of all the counties, and incalculable evils would sometimes result even from a brief delay; yet in all these cases, the power exists, either of refusing to act at all, or of acting from motives the most unpardonable and for purposes the most ruinous. Again, it is the duty of the governor to convene the council, to determine who have been elected as senators in this commonwealth, or as representatives to Congress; and yet he may omit to do either, and thus cancel our rightful influence in the councils of the nation, or suspend the functions of our own legislature. This argument of the Respondent, if rightfully apprehended, derives all its force from the alleged danger of the power, which it impugns. But he admits, that by the constitution, the governor, in all cases of emergency,

may wield the whole military force of the state: yet in this last case, the abuse of the power, is at least as probable, and of course the danger as imminent, as in the former. These are specimens only of a class of cases which might be almost indefinitely extended, where powers have been given which may be perverted, and where perversion would draw after it a train of public calamities; but yet the existence of the power has never been questioned; nor, indeed, could civil society subsist without some department of government was made its depository. There is one pervading difference, however, between mal-administration by overt acts of oppression and mal-administration by neglect of duty. The former can be resisted more easily than the consequences of the latter can be supplied. Objections to the possession of this power, arising from its susceptibility of abuse, might have been weighty arguments against the adoption of the constitution; but when it was once adopted the objections were superseded. They surely did not survive to destroy by construction the existence of a power, whose exclusion from the body of that instrument, they were originally too feeble to accomplish.

The powers of the executive, both civil and military, are exercised under the responsibilities of an oath; and by the 8th Art. of the 2d Sec. of the 1st Chap. the governor is made liable to impeachment before the senate for any misconduct or mal-administration in his office, and to sentence of perpetual disqualification to hold or enjoy any place of honor, trust or profit under this commonwealth.

But to the suggestion of impeachment, as one of the safeguards provided by the constitution. The Respondent replies, that the power of calling out the militia, if it exist at all, in times of peace, is a *discretionary* power, and that "the power of impeachment can never be applied to a case of clear discretionary power." Could the position be maintained, that the exercise, in any manner, of a discretionary power, could not be the subject of legal animadversion and punishment, miserable indeed would be the condition of society. All powers, which are not in the strictest sense ministerial, and many that are so, involve and demand discretion, either as to the time, the place, the occasion, or the general circumstances in which they are to be commenced, exercised and discontinued or suspended. Innumerable illustrations might be cited from every department of power. For example, by the statute of 1822, Chap. 102, commanders of companies are authorized to parade their companies

one day in the year, for company discipline. But no day is pointed out, nor the hour at which the muster-roll of the company shall be called, nor that at which the company shall be dismissed. Yet, could a commander under this investment of discretionary power, order out his company in mid-winter, keep them under arms, from midnight to midnight, march them through fields of snow, and halt them in streams of water, and then screen himself from the just consequences of such enormities under an alleged exercise of discretion?

Again, it is said that *discretion* is necessarily unlimited, and that any use of it "however extreme" would not be impeachable. But discretion, both in theory and in practice, has its limits; otherwise, where does indiscretion begin? Where an act, plainly perverse, tyrannical or corrupt, is committed, the necessary legal inference is that it was not performed in the honest exercise of judgment. If no other motive than caprice, wantonness, or cruelty can be discerned, it would be a plain violation of all the dictates of common sense, for the offender to allege that he acted deliberately and conscientiously, or for any tribunal, if it were so alleged, to believe it. The constitution makes *misconduct* and mal-administration in office, the subject of impeachment; and the sinister use of a discretionary power is as conceivable and as possible, as an unjust use of a judicial one; and either, it is believed, would constitute "misconduct in office." And here another suggestion may be noticed, which is, that it is incumbent upon those, who maintain the existence of this discretionary power, to assign exact and precise limits to its action. To this it may be briefly answered, that it is involved in the very nature of discretion, to adapt and conform its conclusions to circumstances; and that adding to, or taking away a single fact from any combination of facts, would often require a modification, perhaps an entire reversal of a former decision; and thereupon, unless all the circumstances are delineated beforehand, no earthly tribunal could determine what would, or what would not be a proper exercise of discretion. The velocity of a descending body might as well be determined, without any knowledge of its density, its shape, or of the resisting power of the medium, through which it gravitated.

From this review it is obvious, that when the constitution of this commonwealth was adopted, the military powers possessed by the governor, were, indeed, formidable. They resembled rather the sovereign authority of a Roman Dictator, than the limited sway of one, whose high distinction it is to be called the

first among equals. But gradually they have been subtracted, until now there seems to be nothing left for military ambition to lust after, nor for timidity to dread.

But lest there should be error in the conclusion to which the judge advocate has arrived in examining the theory of our government, he now proposes to take a brief retrospect of its practice. The custom of ordering out the militia for escort duties, for firing salutes and for other purposes, seems to have been almost contemporaneous with the existence of the government, and to have continued, though with gradually diminishing frequency, to the present day.

The orders appear to have comprehended a greater number of corps, as well as to have been much more frequent, in the times of Bowdoin, Hancock and Adams, than since the days of those revered men. They were not limited to days of General Election, but were regular accompaniments of every public festivity, when the Chief Magistrate appeared; and were often put in requisition as testimonials of respect and veneration, both to living and departed greatness. Copies and minutes of a great variety of orders are annexed, showing the occasions upon which this power has been exercised. See end of (8.)

Celebration of the ratification of the new Federal Constitution, see No. 1. Escort for General Election, Nos. 6, 7, 19, &c. Escort for the 4th of July, Nos. 2, 3, 17, 20. To Escort the Vice President of the United States from his seat in Braintree to Boston, through Charlestown, and to Worcester, Nos. 4, 5. To Escort the President of the United States, Nos. 8, 9, 10. To perform Funeral Services, Nos. 14, 15, 16, 29, 35, 37. Health Orders, Nos. 23, 32.

These orders are referred to merely as specimens, showing the practical construction, contemporaneously given, to the constitutional authority of the "Captain General and Commander in Chief." The execution of these orders was attended, always with some, often with considerable expense; which the Legislature for fifty successive years has uniformly paid. "It is not for this court," (says Mr Justice Story, in the case of the Town of Pawlet vs. Clark et al. 9 Cranch, 324), "It is not for this court upon light grounds or ingenious and artificial reasoning to disturb a construction, which has obtained so ancient a sanction, even if it were at first somewhat doubtful." Again, in the year 1803, it was objected, that the judges of the Supreme Court of the United States had no right to sit as circuit judges, without separate commissions as such. "To this objection," say the court,

“ which is of recent date, it is sufficient to observe that *practice* and *acquiescence* under it, for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has, indeed, fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controled. Of course, the question is at rest, and ought not now to be disturbed.” 1 Cranch, 308.

These authorities exhibit the force of contemporaneous and continued usage, not as creating a law, but as showing how the law was understood at the time and by those who made it. That the performance of escort duties more appropriately devolved upon “ the Independent Company of Cadets,” than upon any other company, seems to be inferrible from the manner of their institution, the rank of their officers and from their traditionary and admitted history. The original records and papers of the company have been destroyed by fire ; but tradition relates, that Governor Shirley in 1741, had occasion to visit the governor of a neighboring province, and that there was no military escort for him. Col. Pollard and a number of young gentlemen volunteered their services, and escorted him to the lines. During their route they formed a determination to organize a corps to act as an escort or body guard to the governor, and this was accomplished soon after their return. The commission before referred to, given by Gov. Shirley to Col. Pollard, was the legal charter for the constitution of this company. These facts respecting the traditionary history of the Cadets, may be found in an interesting memoir of that company, transcribed into the records of the Worcester County Historical Society. Another circumstance strongly tending to the same point is, that the rank of the officers of the cadets is higher than their respective commands ; and such, at the time of the organization of this company, and long before, had been the fact, with the officers of the body guards of the King of England. This company seems to have been immediately attached to the person of the commander in chief, up to the time of Gov. Gage, who, for political reasons, revoked the commission of their captain. Its organization was temporarily interrupted during the Revolution. Such also was the case with the Ancient and Honorable Artillery, a fact which is cited on the authority of the second series of tracts, published by the Massachusetts Historical Society. Since the reorganization of the Cadets in 1786, it is admitted by the Respondent, that they

have, with very few exceptions, performed the service of escort to the government on days of General Election.

Upon this point, however, the judge advocate advises the court, that the practice of this company, though it may be strong evidence of the nature and design of its institution, ought not to be absolutely conclusive upon its rights ; because, after all, the question is, whether these services have been rendered in courtesy to the Chief Magistrate and the other departments of government, without obligation ; or whether they have been rendered in obedience to legal and constitutional authority, exercised through the commander in chief.

One other source of information upon this subject remains to be explored. Next in point of authority to the constructions of the constitution, given by the Supreme Judicature of the State, are those furnished by a uniform course of legislation. It must be admitted by the Complainant, that an authority to call out any portion of the militia to perform escort duty, is, nowhere, expressly and in terms given to the governor by any legislative act ; and it is equally clear, that if it be granted by the constitution, it is nowhere, expressly and in terms, taken away. But various acts are cited by the Complainant by which he supposes that such a power in the executive is manifestly implied, and, in several of them, at least, that it is expressly recognised. The Respondent, on the other hand, contends, that the powers referred to, are not powers to be exercised in times of peace and tranquillity, but that these general references are, by a sound construction, to be restricted to such constitutional powers as may be exercised by the executive in times of invasion, insurrection or other periods of actual danger or well-founded alarm. But the judge advocate deems it unnecessary to undertake an extended analysis of the phraseology of the numerous statutes cited and commented upon for the purpose of deducing their legitimate import, because there are express legislative recognitions and declarations, incapable of misconstruction.

Before, however, adducing these legislative constructions of the meaning of the constitution, two or three objections of the Respondent, apparently entitled to considerable weight, ought to be examined.

The first is founded upon a proviso in the statute of 1822, Chap. 102, which is in these words : “ Provided that nothing herein contained shall be construed so as to prevent any company from meeting for the purpose of drill, funeral service, escort, or other voluntary service.” By this proviso, it is said, that *escort* is ex-

pressly recognised as a *voluntary* service. This seems correct; and were there no other kind of escort known or usually practised than that of the executive and legislative branches of the government on days of General Election, or at other times, when the executive appears in his official character, this proviso would seem incompatible with the existence of the power which is claimed. But it is matter of universal notoriety, that while gubernatorial escorts are rare, and ordinarily take place only at the capital, other escorts for public or municipal celebrations are frequent, and are practised in every section, if not in every town, in the commonwealth. It is farther observable that the body of this section is expressly restricted to *commanders of companies*, and its only object is to affix limits to their authority. The proviso is introduced to rebut a possible presumption, adverse to the authority of the commanders; and it would be a wide departure from any approved rule of construction, to hold, that a proviso, appended to a section to rebut a possible restrictive operation of that section upon the power of a captain, should amount to a restriction upon the authority of all superior officers and control the executive power itself.

Another objection is that no specific fine is inflicted by law upon a private, who neglects to appear for the performance of escort duty; and that if the clerk of a company cannot collect a fine of the privates for non-appearance, the commander of the company cannot be liable for disobedience of orders, requiring him to call out those privates; or, in other words, that there are no other duties enjoined by the law upon a private, than those for the wilful disregard of which a penalty is prescribed, and that if there be no legal obligation upon the private, there can be none upon his commander.

This argument assumes the point, that the private would not be liable in case of neglect. But this seems by no means clear. If, however, it were, as contended for by the Respondent, it is at most a *casus omissus*, as it regards the private; but it is clearly not so as it regards the commanding officer, for by the 7th Art. of the 34th Sec. of the Stat. 1809, Chap. 108, it is provided, that, "every captain or commanding officer, who shall either neglect or refuse to call out his company as often as and at the times required by this act, or *at any other time*, when thereto required by his superior officer, shall be liable to be tried by a court martial."

By the 10th Sec. of the Stat. of 1821, Chap. 92, "any non-commissioned officer or private, who shall refuse or wilfully

neglect to give any notice or warning, when ordered thereto by the commanding officer of the company to which he belongs, shall for such offence forfeit not less than \$20 nor more than \$50." Now a private, who, from sickness or infirmity, is unable to perform military duty is not compellable to pay a fine; and yet it is apprehended, that the law would not allow the person designated to warn him to be the judge of his liability to perform the duty required, and to obey or disobey the order to warn him at his own option. And yet in this example, the law recognises the validity of the excuse, while in the case of the private, it, at most, merely omits to inflict a punishment.

The last objection to be noticed, if well founded, precludes the propriety of examining the history of our legislation at all. It consists in this; that fixing a construction of the constitution is a *judicial* act; that the constitution itself declares, that "the legislative department shall never exercise the executive or judicial powers or either of them," and therefore, that the legislature cannot, by any series of enactments, however long continued or frequently recurring, affix any construction to the language or provisions of the constitution. This objection is founded upon a misconception of that article in the Bill of Rights, whose object it is to protect each of the great departments of government against the encroachments of the others. The only meaning of that article is, that no *one* of these departments shall, besides its own, exercise the entire or principal functions of either of the other departments. Were its true import more comprehensive than this, our constitution would be signally repugnant to itself; for it actually establishes to a considerable extent a mixture of these powers. The executive, for instance, has a qualified negative upon the two branches of the legislature. The Senate, a part of the legislature, may sit as a court of impeachment, and condemn and sentence members both of the executive and judiciary departments. The members of the judiciary department are nominated and commissioned by the executive, and may be removed by the same authority, upon the address of both branches of the legislature. And it has been suggested by the highest authority, that, as the appointment of executive officers is in its nature an executive function, the framers of our constitution, have in this respect violated, even upon the most open construction, the rule, propounded as an axiom, by themselves. To maintain, therefore, that a series of legislative enactments, long acquiesced in by the courts and the people, can give a certain construction to any part of the con-

stitution, which might have been originally uncertain, impugns in no degree, that article in the Bill of Rights which prescribes, as a controlling principle, the separation of the legislative, judiciary and executive powers. See the 40th No. of the *Federalist*, and *Montesquieu's Spirit of the Laws*.

Having attempted to vindicate the competency of the legislative departments to affix, in doubtful cases, a construction to the constitution, the judge advocate will subjoin a few quotations from a distinguished statesman and civilian upon the manifest propriety and expediency of holding such constructions to be authoritative and binding. Mr Madison, in discussing the question "how far legislative precedents, expounding the constitution, ought to guide succeeding legislatures and to overrule individual opinion," has the following remarks:

"The case in question has its true analogy in the obligation arising from judicial expositions of the law on succeeding judges; the constitution being a law to the legislator, as the law is a rule of decision to the judge.

"And why are judicial precedents when formed on due discussion and consideration, and deliberately sanctioned by reviews and repetitions, regarded as of binding influence, or rather as of authoritative force, in settling the meaning of a law? It must be answered, 1st. Because it is a reasonable and established axiom, that the good of society requires that the rules of conduct of its members should be certain and known, which would not be the case if any judge, disregarding the decisions of his predecessors, should vary the rule of law according to his individual interpretation of it. 2d. Because an exposition of the law publicly made, and repeatedly confirmed by the constituted authority, carries with it, by fair inference, the sanction of those, who, having made the law, through their legislative organ, appear under such circumstances to have determined its meaning through their judiciary organ.

"Can it be of less consequence, that the meaning of a constitution should be fixed and known, than that the meaning of a law should be so? Can indeed a law be fixed in its meaning and operation, unless the constitution be so? On the contrary, if a particular legislature, differing in the construction of the constitution, from a series of preceding constructions, proceed to act on that difference, they not only introduce uncertainty and instability in the constitution, but in the laws themselves; inasmuch as all laws, preceding the new construction and incon-

sistent with it, are not only annulled for the future, but virtually pronounced nullities from the beginning.

“There is in fact and in common understanding a necessity of regarding a course of practice as above characterized, in the light of a legal rule of interpreting a law; and there is a like necessity of considering it a constitutional rule of interpreting a constitution.

“That there may be extraordinary and peculiar circumstances, controlling the rule in both cases, may be admitted; but with such exceptions the rule will force itself on the practical judgment of the most ardent theorist. He will find it impossible to adhere to and act officially upon his solitary opinions, as to the meaning of the law or constitution, in opposition to a construction reduced to practice, during a reasonable period of time; more especially where no prospect existed of a change of construction by the public or its agents. And if a reasonable period of time, marked with the usual sanctions, would not bar the individual prerogative, there could be no limitation to its exercise, although the danger of error must increase with the increasing oblivion of explanatory circumstances and with the continued changes in the import of words and phrases.

“Let it then be left to the decision of every intelligent and candid judge, which on the whole is most to be relied on for the true and safe construction of a constitution; that which has the uniform sanction of successive legislative bodies, through a period of years, or that which depends upon the opinion of every new legislature.” — *Mr Madison's Letter to C. J. Ingersoll, Esq.*

It seems almost superfluous to observe, that the legislative and the judiciary departments must both be governed by the same rules of construction, though the judiciary, in the last resort, possesses paramount authority.

We now proceed to cite a few of those acts of the legislature, which it is believed never could have been passed, under a different interpretation of the constitution, from that here attempted to be maintained.

By a resolve of June 26th, 1811, it is provided “that whenever the commander in chief of the militia of this commonwealth shall *direct* any militia company to perform escort duties, the commanding officer of such company or corps shall present his account for necessary music to the quarter-master-gen-

eral by whom the same shall be discharged out of the commonwealth's moneys in his hands." The power of the commander in chief to *direct* any company or corps of the militia to perform escort duty is here clearly recognised, and for twenty successive years, the legislature, by a distinct, annual, legislative act, have provided for defraying the expenses of music, incurred by such direction.

Again, the statute of 1814, Chap. 181, Sec. 6, enacts, "that no officer appointing a court martial, court of inquiry, or board of officers, shall order out a guard, unless in his judgment, such guard be necessary to protect said court martial, court of inquiry or board of officers." This section is wholly restrictive, both in form and substance. And what did it restrict? Surely, the preëxisting power of the commander in chief, and of major generals to order out a guard. Upon any other construction, it was a restriction upon that which had no existence. As to the suggestion, that if a guard be necessary for the protection of the court, then, that a case exists of tumult or threatened insurrection; the query would seem not inapposite, why, when a general and ample authority had been given in such cases by the statute of 1786, Chap. 59, a further provision for the exercise of this limited and special power should be deemed necessary.

An act of recent date has been referred to both by the Respondent and the Complainant. It is an order of the two Houses, of the 20th of January last, requesting the governor to *direct* such military corps to perform escort duty on the occasion of the centennial celebration of the birth-day of Washington, as he may judge proper. Upon this, the judge advocate advises the court, that no duty whatever can constitutionally be imposed upon the militia or any corps or individual thereof, by any *order* of the two branches of the legislature; that the militia would not be bound to notice such an order; and that if the governor had not, on the occasion referred to, possessed the constitutional power of ordering them out, then the two branches of the legislature by that order required him to violate the constitution.

With the introduction of one further authority, the judge advocate will close this part of the case.

By general orders of the 25th of June, 1792, Col. Bradford of "The Independent Company of Cadets" was appointed to command a detachment of the 1st Division, which was ordered on duty on the 4th day of July of the same year.

Capt. Laughton of the Fusileers refused to obey the orders of Col. Bradford on that day, and in contempt thereof marched his corps off the parade. By another general order of the 9th of the same July, Major General Jackson was commanded "by order of the captain general," to "take such steps as the laws direct to arrest and bring to trial the said Captain Laughton, for disobedience of orders." Capt. Laughton was tried at Milton on the 14th day of the next August, upon charges founded upon that offence, was found guilty and broken. He immediately petitioned the General Court to be restored to his command and the following resolve was passed in his favor.

"On the petition of Joseph Laughton, praying to be reinstated in the command of the Independent Company of Fusileers — Although this court are sensible of the absolute necessity of a strict obedience to military order, and are convinced of the propriety of the proceedings of the court martial, held at Milton, on the 14th of August last, for the trial of said Laughton, for disobedience of orders on the 4th of July last, yet, as the said Laughton has applied to this court to be restored, and the members of the court martial have recommended his restoration, and in consideration of said Laughton, having been an attentive and useful officer, — Therefore,

"Resolved, That the sentence of the Court Martial, held at Milton, on the 14th day of August last, against Joseph Laughton, Capt. of the Independent Company of Fusileers in Boston, be, and hereby is reversed."

The points which this resolve is believed fully to sustain, are, that the legislature, in passing it necessarily recognised, and acted upon the recognition, that the commander in chief possessed the constitutional power of ordering out detachments of militia, when no case of tumult or of actual or threatened insurrection or invasion existed, and for a purpose not specially prescribed by any statute law of the land; and that a commissioned officer (however it might be with a private) was amenable to a military tribunal for any offence against military law, committed on such an occasion.

There is one further view of which the acts and recognitions of the legislature, repeated from time to time, is susceptible. "In fine," (says the 10th Art. of the Bill of Rights) "the people of this commonwealth are not controlable by any other laws, than those to which their constitutional representative body have given their consent." And it is a familiar principle, that a

series of recognitions are as irrefragable evidence of consent, as any previous and positive declaration can be.

For these reasons the judge advocate advises the court, that the governor of the commonwealth had a legal and constitutional power to order out the Respondent with his company, to perform escort duty on the 4th day of January last.

The judge advocate here prays the indulgence of the court. It will be recollected by the court, that when they last adjourned, it was at the suggestion of the Respondent, and for the purpose of allowing him time to reply to the argument of the Complainant upon the above questions. It was then arranged, for the convenience of the court, that they should adjourn over for three days; that in the meantime, the Respondent should prepare his argument, and hand it to the judge advocate, that he might be able to draw up an opinion for the court at their next meeting. But the professional avocations of the Respondent's counsel have been such, that an outline only of his argument was handed to the judge advocate, the evening before the last, at a little past 11 o'clock, and the intervening time has been the only opportunity afforded him to reduce this opinion to writing. He is able, therefore, only to advise the court at this time, upon one of the questions, raised by the exceptions. But should the court sanction and adopt the opinion of the judge advocate upon the first question raised by the exceptions, it will become unnecessary for him to prepare an opinion upon the second; from which, if it be not necessary, he prays to be excused.

(No: 1.)

Boston, Feb. 9, 1788.

SIR, — You will please to order the company of Cadets, the Light Infantry, the Republican Volunteers, the Fusileer company, Capt. Green's company of Light Infantry, Capt. Spooner's and Johnson's companies of Artillery, and the Boston and Roxbury companies of Horse, to turn out and parade in State street, in Boston, on Tuesday next, at 11 o'clock in the forenoon, to celebrate the ratification of the new Federal Constitution.

By command of the Captain General,

ISRAEL KEITH, *Adj. Gen.*

Hon. Maj. Gen. LINCOLN,

(No. 2.)

GENERAL ORDERS.

Boston, June 30, 1788.

Major General Lincoln will order the after mentioned corps of the First Division to appear under arms on the Common in Boston, on Friday next, the 4th day of July, at 10 o'clock before noon, to celebrate the Anniversary of Independence, viz. Lieut. Col. Bradford's Cadets, Capts. Green's and Otis' Light Infantry, Capt. Johnson's Artillery, and Turner's Fusilier's. When they are assembled, they will receive the order of the day.

By order of the Commander in Chief,
WILLIAM DONNISON, *Adj. Gen.*

Maj. Gen. LINCOLN.

(No. 3.)

AFTER ORDERS FOR THE CELEBRATION OF INDEPENDENCE.

Boston, July 3, 1788.

Lieut. Col. Bradford, will command the several corps of the first Division, under orders to parade in Boston tomorrow. Each divisionary corps will be permitted to bear its own standard, and the whole will be manœuvred until 11 o'clock, when the Cadets will march to the State House, and escort the governor and procession to the Old South Church, where an oration is to be delivered, after which, they will re-escort His Excellency back to the State House, march to the field, and join the other corps, and the whole will march into State street, fire a *feu de joie*, and be dismissed, except the Artillery, which will proceed to the house of the Commander in Chief, perform there such firings as shall be directed, and then be dismissed.

By order of the Commander in Chief,
WILLIAM DONNISON, *Adj. Gen.*

Maj. Gen. LINCOLN.

(No. 4.)

GENERAL ORDERS.

Boston, March 23, 1789.

The Commander in Chief orders, That a military escort of Horse accompany the Vice President of the United States on his departure from this commonwealth, for the seat of federal government, during his first day's journey, and that other suitable

honors be paid him on that occasion. Therefore, the Major General of the first division will order a troop of horse well mounted and the men in uniform to march to the seat of the Vice President in Braintree, on the 13th day of April next, so as to arrive there by eight o'clock in the morning, from thence the commanding officer with the troop will escort the Vice President to the house of the Commander in Chief in Boston.

The Major General of the first division, will also order a detachment with an officer from a company of artillery in his division, with two field pieces (provided with ammunition) to be on Boston common, by eleven o'clock in the forenoon, of that day. And the officer commanding the Artillery, will salute with thirteen guns on the arrival of the Vice President at the house of the Commander in Chief, and with thirteen guns on his departure therefrom.

The Major General of the third division, will order a troop of Horse well mounted and in uniform to march to Boston, and to appear on Boston common, by twelve o'clock on that day. On the departure of the Vice President from the house of the Commander in Chief, both troops of horse will join in the escort, and under the command of the senior officer will proceed on the route through Charlestown.

The Major General of the third division, will also order a company of Artillery of that division, with two field pieces (provided with ammunition) to be posted on the great square in Charlestown, at twelve o'clock on that day, and when the Vice President shall have passed the square, the commanding officer of the Artillery will salute with thirteen guns.

The escort of horse will proceed on to Cambridge common, when the troop of the first division will draw off, and march to their quarters. The troop of the third division will continue the escort, to the place where the Vice President shall take up his quarters for the night, they will then retire and be dismissed.

By order of the Commander in Chief,

WM. DONNISON, *Ad. Gen.*

Major Generals of the First and Third Divisions.

(No. 5.)

GENERAL ORDERS.

Boston, March 24, 1789.

The Commander in Chief orders, That Major General Warner of the seventh Division, detach from the regiment of cavalry

in that division, an officer, with twelve men, well mounted, and their horses properly caparisoned; to escort the Vice President of the United States from the county of Middlesex to the town of Worcester, on his route to the seat of federal government on Tuesday, the fourteenth day of April next.

By order of the Commander in Chief,

WM. DONNISON, *Ad. Gen.*

Major General WARNER, 7th Division.

(No. 6.)

GENERAL ORDERS.

Boston, May 20, 1789.

The Major General of the First Division will order Lieut. Col. Bradford with his Corps of Independent Cadets, to appear under arms on the common field in Boston on Wednesday the 27th inst. at 10 o'clock before noon, being the day of General Election, where he will receive further orders from the Captain General.

By order of the Commander in Chief,

WM. DONNISON, *Ad. Gen.*

Major General LINCOLN, 1st Division.

(No. 7.)

AFTER ORDERS FOR THE 27TH OF MAY.

Lieut. Col. Bradford, commanding the corps of Cadets, now under orders to appear on the common field, will march them to the council chamber at eleven o'clock, and escort the governor, the council and others in procession to the chamber of the senate, from thence to the old brick Church, from thence again to the chamber of the senate, and back to the council chamber, where the escort will terminate, and the company dismissed from duty.

By order of the Commander in Chief,

WM. DONNISON, *Ad. Gen.*

Boston, May 25, 1789.

(No. 8.)

GENERAL ORDERS.

Boston, Oct. 19, 1789.

The following divisionary corps of the first Division, will be held in readiness at the shortest possible notice, to turn out complete in arms, uniform and equipments for parade duty, viz.

The corps of Cadets, Light Infantry and Fusileers, of Boston. The Boston, Roxbury and Dorchester corps of Artillery, and the Roxbury Troop of House.

By order of the Commander in Chief,

WM. DONNISON, *Ad. Gen.*

Brig. Gen. THAYER, Com. officer of the 1st Division.

(No. 9.)

GENERAL ORDERS.

Boston, Oct. 23, 1789.

Brigadier General Thayer of the first Division, will order the Roxbury Troop of Horse, to march to the treasury in Boston, tomorrow morning at 9 o'clock. The troop will escort the Lieutenant Governor and council from thence to Cambridge, to meet the President of the United States, and on meeting the President, will precede him in escort to the entrance of the capital of the commonwealth. The Roxbury corps of Artillery will be posted on the hill near the meeting-house tomorrow at 10 A. M., and when the President shall appear in sight, the commanding officer will salute with thirteen pieces. The Dorchester corps of Artillery will be posted on Dorchester Heights, tomorrow at 10 A. M. and when the commanding officer shall observe the discharge of artillery at Boston, he will salute with thirteen pieces. The corps of Cadets, Light Infantry, Fusileers and Artillery of Boston will parade on Boston Common tomorrow at 10 A. M. and await further orders.

By order of the Commander in Chief,

WM. DONNISON, *Ad. Gen.*

Brig. Gen. THAYER, Com. officer of 1st Division.

(No. 10.)

GENERAL ORDERS.

Boston, Oct. 24, 1789.

Lieut. Col. Bradford will take command of the troops of the First Division, under orders, to assemble on Boston Common tomorrow morning at 10 o'clock, and march them to the old lines on Boston neck, and when the President of the United States shall arrive there, the troops under Lieut. Col. Bradford will precede him in escort into the town, to the State House, and to his quarters.

By order of the Commander in Chief,

WM. DONNISON, *Ad. Gen.*

Brig. Gen. THAYER, 1st Division.

(No. 11.)

GENERAL ORDERS.

Boston, June 17, 1790.

The Commander in Chief was highly gratified when he was informed, that Brigadier General Thayer, commanding the First Division, had ordered out the regiment and corps of Boston, on Thursday the seventeenth instant, and he is extremely sorry, that a postponement has been made thereof to the thirtieth ; it being the wish of the Commander in Chief, that these corps should be out during the Session of the General Court ; he thinks, however, his wishes may yet be complied with, and that the regiment and corps of Boston, may be out on Wednesday or Thursday next.

Brig. Gen. Thayer will therefore issue his orders accordingly.

By order of the Commander in Chief,

WM. DONNISON, *Ad. Gen.*

Brig. Gen. THAYER, commanding 1st Division.

(No. 12.)

GENERAL ORDERS.

Boston, June 21, 1790.

It having been represented that the regiment and corps in Boston, in the First Division, are not in so good a state to be called out at present, as they may be in a short time hence, The commander in chief has thought proper to revoke the general order of the seventeenth instant, and no regiment, or corps, will be turned out in Boston, until after the fifth day of July next ; as after that time, perhaps the whole will be ordered out together.

By order of the Commander in Chief,

WM. DONNISON, *Ad. Gen.*

Brig. Gen. THAYER, commanding 1st Division.

(No. 13.)

GENERAL ORDERS.

Boston, July 3, 1790.

Brig. Gen. Thayer, commanding the First Division, will order the Roxbury troop of cavalry, under the command of Col. Tyler, to march to the house of the commander in chief on Wednesday the twentyfirst instant, to escort His Excellency

to Cambridge. The troop will be provided only for parade duty, and will arrive in Boston by seven o'clock in the morning.

By order of the Commander in Chief,

WM. DONNISON, *Ad. Gen.*

Brig. Gen. THAYER, 1st Division.

(No. 14.)

GENERAL ORDERS.

Boston, Nov. 6, 1790.

Lieut. Col. Bradford, commanding the corps of Cadets in the First Division, will be ordered to appear with his company under arms, on the common in Boston on Wednesday next, at two o'clock. The corps will march from thence at three, and after escorting the funeral procession of the Hon. James Bowdoin from his late dwelling-house, to the place of interment, and will pay military honors to the deceased.

By order of the Commander in Chief,

WM. DONNISON, *Ad. Gen.*

Brig. Gen. THAYER, 1st Division.

(No. 15.)

GENERAL ORDERS.

Boston, Nov. 8, 1790.

Brig. Gen. Thayer will order a detachment from Capt. Johnson's company of Artillery in the First Division to parade with a field piece on the common in Boston on Wednesday next, precisely at three o'clock P. M., to pay such funeral honors to the Hon. James Bowdoin, deceased, as shall then be ordered.

By order of the Commander in Chief,

WM. DONNISON, *Ad. Gen.*

Brig. Gen. THAYER, 1st Division.

(No. 16.)

AFTER ORDERS.

Nov. 9, 1790.

Brigadier General Thayer will detach the whole of Captain Johnson's company of Artillery, for the purpose expressed in the general order of yesterday. Captain Johnson will take post with his two field pieces on Beacon Hill, and fire thirteen minute guns, commencing when the funeral procession begins

to move; and thirteen minute guns, so as to finish, as nearly as may be, when the corps shall arrive at the tomb.

By order of the Commander in Chief,

WM. DONNISON, *Adj. Gen.*

Brig. Gen. THAYER, 1st Division.

(No. 17.)

GENERAL ORDERS.

Head Quarters, Boston, June 9, 1791.

Brigadier General Thayer of the 1st Division, will order the corps of Fusileers under Captain Laughton, to parade before the Council Chamber, on Monday the fourth day of July next, at eleven o'clock before noon, to do the military honors of the day, in commemoration of the Anniversary of American Independence. When the corps is paraded, Captain Laughton will receive the necessary arrangement for the day.

By order of the Commander in Chief,

WM. DONNISON, *Adj. Gen.*

(No. 18.)

GENERAL ORDERS.

Head Quarters, Boston, July 4, 1791.

Major General Brooks of the third Division, will order Captain Fuller, with his troop of cavalry to march to Boston on Wednesday the 20th instant, to escort the commander in chief to the Commencement at Cambridge. The troop will be at head quarters precisely at seven o'clock, in the morning.

By order of the Commander in Chief,

WM. DONNISON, *Adj. Gen.*

Major Gen. BROOKS, 3d Division.

(No. 19.)

GENERAL ORDERS.

Head Quarters, Boston, May 22, 1792.

The Major General of the first Division, will order the corps of Fusileers, under Captain Laughton, to parade before the Council Chamber, on Wednesday the thirtieth instant, precisely at eleven o'clock, to do the military honors of the day, and to escort the Governor and Council to the State House, and to the old brick Church in Cornhill.

By order of the Captain General,

WM. DONNISON, *Adj. Gen.*

To Major Gen. JACKSON.

(No. 20.)

AFTER GENERAL ORDERS FOR THE 4TH JULY.

Head Quarters, Boston, July 3, 1792.

The troops under orders to parade in Boston the 4th instant, to celebrate the Anniversary of American Independence, will act as follows : viz. The artillery will fire 13 guns on the Common, at sun-rising, and will parade together with the infantry, at the same place, at ten, in the morning ; at eleven the artillery will be dismissed until after the oration. The infantry will escort the supreme executive from the Council Chamber to the Church, and back to the Council Chamber, and from thence will march into the field, where, with the artillery, the whole will form in line, fire a *feu-de-joie*, march into State street, form the line, and fire three volleys from the infantry, after which the whole will be dismissed.

Per order of the Captain General,
WM. DONNISON, *Adj. Gen.*

(No. 21.)

GENERAL ORDERS.

ORDER OF THE DAY FOR COMMENCEMENT.

Head Quarters, Boston, 12 July, 1791.

Captain Fuller, with his troop of cavalry, under orders to parade at head quarters in Boston, on Wednesday the 20th inst. at 7 o'clock, in the morning, will march from thence at eight, and escort the commander in chief by the route of Roxbury to Cambridge University. Captain Fuller will then retire with his troop to quarters, at Reed's, where every necessary accommodation will be provided. At five in the afternoon, the troop will parade again near President Willard's from whence the commander in chief will set out, under the escort, by the route of Charlestown, to his seat in Boston, when the troop will be dismissed,

By order of the Commander in Chief,
WM. DONNISON, *Adj. Gen.*

(No. 22.)

GENERAL ORDERS.

Head Quarters, Boston, July 9, 1792.

Lieut. Col. Bradford, appointed by the general order of the 25th ult. to command a detachment of the first division, which

was ordered on duty the 4th instant, having reported, that Captain Laughton of the Fusileers, refused to obey his orders on that day, and in contempt thereof, marched his corps off the parade, Major General Jackson will therefore take such steps as the law directs, to arrest, and bring to trial the said Captain Laughton for disobedience of orders, as expressed in the report of Lieut. Col. Bradford, a copy of which is herewith transmitted, and the adjutant general is directed to adduce the evidence before the court, and to prosecute in behalf of the commonwealth.

By order of the Captain General,
WM. DONNISON, *Adj. Gen.*

(No. 23.)

GENERAL ORDERS.

Head Quarters, Boston, Sept. 7, 1792.

Major General Jackson will detach from the first division of the militia under his command, one subaltern and thirty men, including a due proportion of non-commissioned officers, to do duty on Castle Island for three weeks, unless sooner discharged. It will be necessary, that all the men detached shall have had the small pox, as they are designed to strengthen that fortress, while part of the garrison are under inoculation; and it will be necessary for the detachment to march, or embark for the Castle tomorrow, before noon if possible.

By order of the Captain General,
WM. DONNISON, *Adj. Gen.*

(No. 24.)

GENERAL ORDERS.

Head Quarters, 1st Nov. 1792.

The commander in chief having concluded to set off for Concord on Monday next, at 9, in the morning, and not on Tuesday, as mentioned in the order of the 27th ult. The troop of cavalry of the first division, under orders as an escort, will appear at head quarters on Monday the fifth instant, precisely at eight in the morning for that purpose.

By order of the Captain General,
WM. DONNISON, *Adj. Gen.*

(No. 25.)

GENERAL ORDERS.

Head Quarters, Concord, Nov. 10, 1792.

Major General Brooks of the third division, will order a detachment of cavalry, not exceeding twentyfour rank and file, properly officered, to hold themselves in readiness on short notice, to march to Concord, as an escort to the commander in chief, from thence to Boston.

By order of the Captain General,

WM. DONNISON, *Adj. Gen.*

(No. 26.)

GENERAL ORDERS.

Head Quarters, Concord, Nov. 17, 1792.

Major General Brooks of the third division will order the detachment of cavalry, directed by the order of the 12th instant, to appear at head quarters in Concord, on Monday next, precisely at 8 o'clock, in the morning, to escort the commander in chief.

By order of the Captain General,

WM. DONNISON, *Adj. Gen.*

(No. 27.)

Is the resolve of the General Court, passed Nov. 16, 1792, in the case of Capt. Laughton of the Fusileers, mentioned and referred to in the opinion of the judge advocate in number (8)

(No. 28.)

GENERAL ORDERS.

Head Quarters, Boston, Jan. 22, 1793.

Major General Jackson, will detach a lieutenant and eighteen men of the corps of Artillery in Boston, with two three pounders, to parade in Market square, on Thursday next, during the civic feast in honor of the French Republic. The detachment will assemble for that purpose, at such previous time, as the Major General shall direct; and the order of the day will be communicated to the commanding officer at the place of parade.

By order of the Capt. General,

WM. DONNISON, *Ad. Gen.*

(No. 29.)

GENERAL ORDERS.

Head Quarters, Boston, Feb. 16, 1793.

Major General Jackson of the first Division will order the company of Boston Fusileers under the command of Captain Laughton to parade in Charter street, at the Mansion House of the late Commodore Manly, on Monday next, at three o'clock, in the afternoon, for the purpose of paying the usual funeral honors to that brave sea officer.

By order of the Capt. General,
WM. DONNISON, *Ad. Gen.*

(No. 30.)

GENERAL ORDERS.

Head Quarters, Aug. 17, 1793.

Major General Jackson of the first Division, will order the Company of Artillery under Captain Bradley to parade on Fort Hill, with his two six pounders, at the time when the frigate Le Concord, belonging to the French Republic, shall come to anchor, in the harbor of Boston, and after the frigate has saluted the town, Captain Bradley will return an equal number of guns.

By order of the Capt. General,
WM. DONNISON, *Ad. Gen.*

(No. 31.)

GENERAL ORDERS.

Head Quarters, Boston, Aug. 22, 1793.

Captain Van Dongen of the frigate Le Concord, belonging to the French Republic, having notified his intention to sail tomorrow morning, the commander in chief being desirous on this occasion of paying particular respect to the Republic, Orders, that the commandant of Castle Island, salute the National Flag with twentyone guns, when the frigate passes that fortress, and upon all future occasions, when a public ship of war shall salute the Castle, that an equal number of guns be returned.

By order of the Captain General,
WM. DONNISON, *Ad. Gen.*

Commandant of Castle Island.

(No. 32.)

GENERAL ORDERS.

Head Quarters, Boston, Sept. 24, 1793.

Major General Jackson will order a military guard, to consist of one sergeant and twelve men, from such part of his division as will be most convenient, to mount daily at Boston neck, until further orders, for the purpose of preventing the introduction of the yellow fever from Philadelphia or any other infected place. The guard will observe such directions and instructions as shall be given them by the selectmen, and health officers of the town of Boston.

By order of the Capt. General,

WM. DONNISON, *Ad. Gen.*

Sept. 25, 1793. The Quarter Master will furnish quarters and subsistence to the above guard on Boston Neck.

By order of Capt. General,

WM. DONNISON, *Ad. Gen.*

October 1, 1793. Major General Jackson, Ordered to take off the above guard stationed at Boston Neck.

By order of Capt. General,

WM. DONNISON, *Ad. Gen.*

(No. 33.)

GENERAL ORDERS.

Head Quarters, Boston, March 30, 1794.

The Major Generals of the several divisions of the Militia, on the sea coast of this commonwealth will immediately on receiving this order, cause such directions to be given to the commanding officers of the militia, at the several seaports, within their respective districts, as shall be necessary to afford all lawful aid to the officers of the customs of the United States, in carrying into effect an embargo, laid by a resolve of Congress for thirty days from the 26th instant (unless sooner discontinued) on all ships and vessels, whether cleared out, or not, now in the ports of the United States, and which may be bound to any foreign port or place, excepting ships and vessels commissioned by foreign powers, other than letters of marque.

By order of the Commander in Chief,

WM. DONNISON, *Ad. Gen.*

(No. 34.)

GENERAL ORDERS.

Head Quarters, Boston, Sept. 19, (1795).

The Commandant of Castle Island will fire the following salutes in honor of the French Republic on Monday next, the 21st instant, it being the anniversary day of the establishment of the French people, and the era of the republic, viz. he will fire twentythree guns at sun-rising, twentythree guns at noon, and twentythree guns at sun-setting, taking the fire from the French national ship of war Brutus, which by information from the Consul, is to fire at each of those periods.

By order of the Commander in Chief,

WM. DONNISON, *Ad. Gen.*

Then follows the dates and purposes of sundry orders for escort and other duties by order of the Captain General from 1792 to 1795 — and the following order of the senate, viz.

COMMONWEALTH OF MASSACHUSETTS.

In Senate, January 20, 1832.

The committee on the subject of the centennial celebration of the birth-day of George Washington, report the following orders.

Ordered, That the Rev. Chaplains of the two Houses, be requested to perform such religious exercises as they may deem suitable to the occasion.

Ordered, That a procession be formed, at the State House, at noon, of 22d February next, to consist of his Excellency the Governor, his honor the Lieut. Governor and the members of the Council, if they please to attend, of the Senate and House of Representatives, and such other public officers and citizens, as may incline to be present, and move to such place as may be hereafter designated for the proposed celebration.

Ordered, That Messrs Austin of Suffolk, Hastings and Austin of Middlesex, be a committee, with such as the House may join, to superintend the arrangements of the day.

Ordered, That his Excellency the Governor be requested to direct such military corps to perform the escort duties of the day, as he may judge proper.

Read and accepted.

Sent down for concurrence.

CHAS. CALHOUN, *Clerk.*

House of Representatives, Jan. 20, 1832.

Concurred, and Messrs Buckingham of Boston, Harris of Boston, Strong of Pittsfield, and Crocker of Barnstable, are joined.

L. S. CUSHING, *Clerk,*

A true copy, attest,
CHAS. CALHOUN,
Clerk of the Senate.

(No. 35.)

COMMONWEALTH OF MASSACHUSETTS.

GENERAL ORDERS.

Head Quarters, Boston, Dec. 12, 1808.

His Excellency James Sullivan, Esquire, Governor and Commander in Chief of this Commonwealth, having deceased on the 10th instant, His Honor the Lieutenant Governor directs, that the deceased be buried with military honors.

The funeral escort will consist of the Boston Cadets; 3 battalions (of 4 companies each) of uniformed infantry, and 3 companies of cavalry to be commanded by Brigadier Winslow of the first division.

The first division to furnish the company of Cadets, 2 battalions of infantry and 2 companies of cavalry; third division, 1 battalion of infantry and one company of cavalry; the battalions and companies to be fully organized.

The first division to furnish one Lieut. Col. Commandant of infantry with his staff, the third division to furnish one Major of cavalry.

The escort will assemble on the common in Boston, on the day of the burial, precisely at eleven o'clock in the forenoon, and the Brigadier General commanding, will give all the necessary orders relating to the disposition, ceremonies, and conduct of the troops which will be under his command on that occasion.

The Major General of the first division will order two companies of artillery to fire minute guns, one on the Common, and the other on Copps Hill, in Boston; and the Brigadier General of the first brigade, third division, who will detach from his brigade the troops herein required from that division, will also order one company of artillery to fire minute guns from Bunker's Hill in Charlestown, during the passing of the funeral; the whole to be under the direction of the Brigadier General of the day, commanding the escort.

The Quarter Master General will furnish the troops ordered on duty with *powder cartridges*, and ammunition for the artillery.

The military officers in the vicinity are invited to attend the funeral in uniform, with the usual badges of mourning; and Brigade Major Thayer is requested to arrange in order, in the procession, the military officers not on duty.

All militia officers in the State are desired to wear badges of mourning on suitable occasions, for one month.

The funeral procession will proceed from the dwelling-house of his late Excellency in Summer Street, in Boston, on Friday next, at one o'clock in the afternoon — the route and manner, will be announced in printed bills.

By order of his Honor Levi Lincoln, Esq. Lieut. Governor and Commander in Chief.

WM. DONNISON, *Ad. Gen.*

A true copy from the records,
WM. H. SUMNER, *Ad. General.*

(No. 36.)

GENERAL ORDERS.

Head Quarters, Boston, 27th Jan. 1800.

The Legislative and Executive bodies of this Commonwealth having resolved that they will proceed to the Old South Church on the 8th day of February next, to hear an oration on the sublime virtues of General George Washington, and that they will attend at Brattle Street Church on the 22d day of said February to hear a discourse on the same subject to be adapted to the occasion,

Major General Elliot will order the company of Independent Cadets to attend the Commander in Chief as the military escort of the government on both occasions.

By order of the Commander in Chief.

WM. DONNISON, *Ad. Gen.*

A true copy,
WM. H. SUMNER, *Ad. General.*

(No. 37.)

GENERAL ORDERS.

Head Quarters, Boston, May 22, 1800.

His Honor Moses Gill, Esquire, late Lieutenant Governor and Commander in Chief of the Commonwealth of Massachu-

setts having deceased the twentieth instant, the honorable council, exercising the powers of the executive, and of the commander in chief, agreeably to the constitution in the vacancy of governor and lieutenant governor, have thought proper to order, that military honors be paid the deceased on the day of interment, which will take place in Boston, on Saturday next, at two o'clock in the afternoon, at which time a funeral procession will be formed and proceed from the dwelling-house of the deceased in School Street in the route and manner as will be communicated by printed bills on said day. The funeral escort will be composed of three battalions of uniformed infantry and one company of cavalry, the whole under the command of a Brigadier General; each battalion will consist of eighty files, and the whole will be furnished from the first division. The several corps will be organized, as far as may be practicable, before they arrive at the place of general rendezvous, which will be on Boston Common, and where the troops for the escort will not fail to be assembled by eleven o'clock before noon on said day.

The Brigadier General commanding, will see that all due honors are paid to the remains of the deceased.

Major General Elliot of the first division will order out one company of artillery in Boston, to be under the orders of the Brigadier General having the command for the day, to fire minute guns during the procession.

The Quarter Master General will furnish all the troops ordered on duty with the necessary ammunition.

Major Cunningham and Major Blanchard will be requested to assist the Adjutant General in carrying into effect the arrangements for the day.

All the military officers who can make it convenient are invited to attend the funeral, in uniform, with the usual badges of mourning. And all military citizens throughout the Commonwealth are requested to wear their uniforms with similar badges of mourning on Sundays, and on other public occasions for one month.

By order of the Honorable Council,

WM. DONNISON, *Ad. Gen.*

A true copy,

WM. H. SUMNER, *Ad. Gen.*

To Adjutant General SUMNER.

Worcester, May 25, 1826.

DEAR SIR, — It has been suggested to me, that it has been usual to issue an order to the Cadets to perform escort duties

to the government, on the day of the General Election. Trusting to your vigilant attention, that whatever has been customary, will be done, in your department, I have only to repeat the assurance of my official sanction, to all such measures, as usage has rendered proper, on this, and on all other public occasions.

With continued most unreserved regard,

Your obedient servant,

LEVI LINCOLN.

A true copy from the records,

WM. H. SUMNER, *Ad. Gen.*

Worcester, May 27, 1827.

To the Adjutant General.

SIR,—I omitted to express my desire that you would attend to the customary orders to the Independent Cadets to perform escort duties on the day of the General Election. You will please also, to make such other arrangements as are proper and usual.

With sentiments of much regard &c.

LEVI LINCOLN.

A true copy from the records,

WM. H. SUMNER, *Ad. Gen.*

Worcester, May 15, 1829.

DEAR SIR, — In answer to your letter of yesterday, I have to say, that I will confer with General Heard on the subject of his renewed application for a discharge previous to a definite decision upon it.

Orders should issue to the Cadets in the usual manner to perform escort duties on the day of election. You will please also to cause such refreshment for them as has heretofore been customary. I beg it to be understood, that the observances which time and my predecessors have sanctioned are held by me in sacred regard.

With sentiments of esteem and respect,

LEVI LINCOLN.

Adjutant General SUMNER.

A true copy from the records,

WM. H. SUMNER, *Ad. Gen.*

Worcester, May 16, 1831.

To the Adjutant General.

I inadvertently omitted to converse with you before I left the city on the subject of arrangements for the Election day. I have scarce a doubt however that you have already anticipated me.

It is my wish that the usual orders should be issued, and the

customary provision made for the escort of the government on that occasion by the Cadets.

Respectfully and with great esteem, yours &c.

LEVI LINCOLN.

A true copy from the records,
WM. H. SUMNER, *Ad. Gen.*

Adjutant General's Office, Boston, March 10, 1832.

I hereby certify that the foregoing are true copies of the records (and minutes taken therefrom) of my office.

W. H. SUMNER, *Ad. Gen.*

The Complainant then submitted a motion, to the court, which is marked (9) as follows :

(9)

December 28, 1831.

DEAR SIR, — Will you have the kindness to send me by the bearer, the order for the Cadets to parade on Election day. I will send it to the Major General so that it may come *regularly* down.

I make this request because the longer notice the company can have, the greater probability of bringing out a goodly number. If the order be sent to Dorchester by the post, a delay in transmitting it, must necessarily occur.

If you prefer it, the order may be sent to Major Capen, Aid-de-camp to the Major General, at the old Bowdoin house in Beacon Street, who will see that it is sent down. I will see you on or before Saturday next regarding the collation.

I have the honor to be very respectfully,

Your obedient humble servant,

(Signed)

GRENVILLE TEMPLE WINTHROP.

And the court adjourned to meet tomorrow morning at 10 o'clock A. M.

TUESDAY, MARCH 13, 10 A. M. 1832.

The court met pursuant to adjournment.

Present. Brig. Gen. William Peck, President. — Col. Thomas Davis ; Col. Charles Lane ; Lieut. Col. Abijah Ellis ; Lieut. Col. Luther Eaton.

The Respondent was called and answered.

The Complainant was called and answered.

The Judge Advocate read the record of yesterday.

The court retired to deliberate.

The court returned, and decided, that the order of the Commander in Chief of the 24th December last, offered in evidence, and excepted to by the Respondent, was a legal order, and therefore that the Respondent was bound to obey the same.

The court further decide, that it is unnecessary for the Judge Advocate to prepare an opinion on the question, whether, if the escort of the government on the day of General Election was a voluntary service, the Respondent, by submitting himself to the command of the commander in chief, could legally withdraw or disobey orders, until the service required was performed; as the decision of the first question had rendered the decision of that unnecessary.

Major Capen was again called, and stated in answer to the question previously put to him. I received an order from the Adjutant General's office, on Friday evening, Dec. 30th, 1831, at 7 o'clock, and immediately annexed a division order. During that evening, I ascertained that this order had not passed the Major General's hands, consequently I did not transmit the order, but retained it; on Saturday, I saw the Major General at 10 minutes past two. He saw the order I have in my hands, (paper marked 4,) and he approved it, and gave me directions to transmit the order I had annexed. A copy of this order was given on Monday morning following, to Newell A. Thompson, Esq. clerk of said company. I saw Col. Winthrop between that day and Wednesday, I believe on Monday, at noon, with the intention of ascertaining whether he had received the order; and he said he found it at his office on Monday morning on his table. Nothing was said about the lateness of the period at which the order was received, at that time.

1. *Question by Complainant.* From whom did you receive the general order?

Answer. I don't know, I found it at home on Friday evening.

2. *Question by same.* When you was directed to transmit the order on Saturday evening, why did you not transmit it?

Answer. I had no other reason, than that the Major General left word for me to see him; I went home to dinner, and after dinner it was too late to copy the order, and leave it at the place, where I leave all orders for Col. Winthrop.

3. *Question by same.* Have you had any directions from Col. Winthrop where to leave orders?

Answer. I have not.

4. *Question by same.* At what time of the day was it when you considered it too late?

Answer. I had found that Col. Winthrop was not in his office usually on Saturday afternoon, and did not think I was bound to go there under such circumstances.

5. *Question by same.* Have you the general orders to which you have referred?

Answer. I have two copies, I annexed my return to the first order I received. It was the same I found on the table.

1. *Question by Respondent.* How did you ascertain that the general order had not passed the Major General?

Answer. I was so told.

2. *Question by same.* Did you call at the office of the Respondent on the afternoon of Saturday, Dec. 31st, to know whether he were there or not?

Answer. I did not.

3. *Question by same.* Did you not know that the Respondent had a place of abode in Boston, and where it was?

Answer. I had supposed that he lived in Boston, but did not know the fact; I had been acquainted with him, and had always left the orders at his office.

4. *Question by same.* Did you make any attempt to find his place of abode?

Answer. I did not.

5. *Question by same.* At what time and place did you hand the order to the clerk of Cadets?

Answer. I cannot tell at what time, the place was at No. 13, Beacon Street.

6. *Question by same.* Why did you hand it to the clerk, instead of Col. Winthrop, or leaving it at his place of abode?

Answer. Because I was told by Col. Winthrop that, in that instance, I might hand the order to his clerk.

7. *Question by same.* By whom were you told that the order had not passed the Major General?

Answer. I was told so by some one at the table, when I found the order.

8. *Question by same.* Was not that information given you by the clerk of Cadets?

Answer. I cannot say.

Question by Complainant. When did Col. Winthrop tell you to leave the order for the escort, with the clerk?

Answer. I think it was on Saturday, I don't know at what time, I think it was, very near opposite the Tremont House.

9. *Question by same.* Did you tell Col. Winthrop anything about having the order in your possession?

Answer. I can't say whether I did at that time, but I did at some time.

Mr Newell A. Thompson was called by Complainant and sworn.

1. *Question by Complainant.* Are you clerk of the Independent Company of Cadets?

Answer. I am.

2. *Question by same.* Did you receive an order from Major Capen, commanding that company to appear and perform escort duty on the 4th day of January last?

Answer. I did, or I received a package which I supposed to be an order, on Monday the 2d of January, or the Sunday evening previous; but I did not know what the package contained. I delivered that package to the office boy of Col. Winthrop, between 8 o'clock A. M., and 2 o'clock P. M. of Monday, with directions to give it to Col. Winthrop, or to leave it on his table. The package was addressed to Col. Winthrop, and I think the word "militia" was written upon it.

3. *Question by same.* When did you notify the Cadets to appear on Election day?

Answer. It was on the last Saturday of last December. I cannot say whether Col. Winthrop directed me or not so to do, but he said, I had better notify them for it was getting late.

4. *Question by same.* At what time of the day did you have this conversation with Col. Winthrop?

Answer. I think it was in the forenoon of Saturday.

5. *Question by same.* In what manner were they notified?

Answer. I don't recollect the form of notice.

Here the Complainant offered in evidence a letter of Col. Winthrop, which is annexed and is marked (9). The Respondent admitted the genuineness of the signature and that the letter was addressed to the Adjutant General.

Brigadier General William H. Sumner, Complainant, was called and sworn.

1. General Sumner was then requested by the Judge Advocate to state any pertinent facts, which he knew, on the subject in hearing, upon which he said, "I received this letter (marked (9) as above) on the evening of its date, and on the following morning I directed a duplicate original of the general order requested by the letter of Col. Winthrop to be made, signed it and left it with my clerk, with directions to send it to Col. Winthrop. I

left it on the table, and there is a messenger, provided by law, who attends upon my office, but whether he delivered it or not I don't know.

The original general order was sent to General Capen on the day of its date by mail.

1. *Question by Respondent.* Was the governor in this city at the date of the general order of the 24th Dec? If not why was the order dated "Head Quarters," Boston, and not Worcester?

Answer. I don't recollect, as to the first question. As to the other, his head quarters are always considered to be where the office is and where the records are kept, though I have known general orders to be dated at the place where the commander in chief happened to be, when he has so directed, on special occasions.

2. *Question by same.* Had you any special directions from the governor to issue that order? If yea, where and when were they given to you.

Answer. Previous to issuing that order I had some conversation with the governor on the subject, but when I cannot precisely say. In consequence of that company's not having chosen their officers, the issuing of the order was delayed longer than usual. I don't remember whether the governor gave me any precise or direct order; but I had frequent conversations with him on the subject in which it was implied that I should issue the orders. It is an order which I should issue, by virtue of his general instructions to me without any special direction.

3. *Question by same.* Is there any standing order or authority to you to order out the Cadets on Election day?

Answer. Not in writing; but there is a general understanding between the governor and myself that I shall issue all orders which are necessary to secure the execution of the ordinary ceremonies of the government.

4. *Question by same.* Are you entrusted with a general discretion of issuing orders to the militia whenever you may think proper?

Answer. I am not.

5. *Question by same.* How then do you derive the power exercised on the present and on similar occasions?

Answer. Because it was a general and customary ceremony. I have been in office during the administration of several governors, and upon their accession to the chair, I have reported to them what has been the customary mode of discharging the

duties of my office, and have taken their directions in what mode to conduct them during their continuance in office. On all *special* occasions they have been *special*ly applied to.

6. *Question by same.* Had you or had you not, either verbally or in writing, general or special directions, authorizing you to issue the general orders in question? If so, please to state particularly and when and how you received the same?

Answer. I had a general authority, and from my conversations with the governor on the subject on this occasion, considered myself as having his directions to do so.

7. *Question by same.* Do you mean to say that you understood the governor in that conversation to give you special direction to issue those orders?

Answer. I did understand the governor as authorizing me to give the order in question.

8. *Question by same.* Are there any orders in the Adjutant General's office from former governors, directing the Adjutant General to issue orders for calling out the Cadets for escort duty?

Answer. I cannot say; but will examine and give information.

Col. Quincy was again called.

1. *Question by Complainant.* Will you state any facts pertinent to the matter in hearing?

Answer. In pursuance of the orders of the commander in chief, I reported myself at the State House on the 4th of Jan. last, at a little before 12 o'clock at noon. About 12 o'clock, the Cadet company drew up in front of the State House, and immediately after Captain Sargent informed me that the company was ready to receive the orders of his Excellency. I told him I would inform the governor and would bring an order to the company. I reported that the company was in readiness to his Excellency, and he directed me to invite the corps to partake of a collation in the antechamber. I carried the message and delivered it to Captain Sargent upon the steps in front of the State House. The officers and corps immediately after presented themselves at the door of the council chamber. The officers were introduced to the commander in chief and the corps passed into the antechamber to partake of the collation. The governor then went into the antechamber and a number of the members of the corps were introduced to him; the corps remained in the antechamber for a considerable length of time, until I informed

Col. Winthrop that the two Houses were organized, and would probably be ready to proceed as soon as he was ready to receive them. The corps was immediately after formed in front of the State House, and I went down and communicated with Captain Sargent, who informed me they were in readiness to take up the escort. I returned and informed the governor of that fact. He immediately presented himself before the corps and was received with the usual salutes. The governor and the two branches of the Legislature then proceeded to the Old South Church, escorted by the corps. The escort was delivered up at the Old South in the usual form; and after entering the church I inquired of his Excellency whether he had any orders to transmit to them. He directed me to deliver an order to Col. Winthrop, which I delivered as soon as I could get through the crowd that were entering the door. The order which I was directed to communicate was that the company should again report itself for escort duty after one half an hour. When I reached the door of the Old South Church, the company were countermarching. As I supposed that it was the intention of the commander to draw up his company facing the church and await further orders, I remained standing until that movement was completed. Immediately on its completion, however, orders were given for the company to break into column, and they commenced marching down Milk Street. As Col. Winthrop was at the head of the column before the music, and at considerable distance from me, and as he had during the day communicated with me through the intervention of Captain Sargent, I delivered my orders to him as adjutant of the company. The corps was at this time on the march, and Captain Sargent's position was on or near the right of the first company. I passed between the first company and the music, and walked by the side of Captain Sargent, while I delivered to him the order, which, I believe, was given to Captain Sargent in exactly the same words which I have before stated. My impression is, that after delivering the order, I added some suggestions of my own concerning the necessity of being upon the spot, at the conclusion of the exercises of the church. After finishing my communication I waited until the company had passed me, and then I returned to the church.

The court adjourned to meet tomorrow morning at half past 9 o'clock.

WEDNESDAY MORNING, 9½ o'clock, MARCH 14, 1832.

The court met pursuant to the adjournment.

Present. Brig. Gen. William Peck, President. — Col. Thomas Davis ; Col. Charles Lane ; Lieut. Col. Abijah Ellis ; Lieut. Col. Luther Eaton.

The Respondent was called and answered.

The Complainant was called and answered.

The Judge Advocate read the record of yesterday, in presence of the witnesses.

Col. Quincy was again called and proceeded in his testimony as follows —

After the conclusion of the exercises, a proclamation was made by the sheriff, that the procession would return under the escort of the Cadets to the State House, and I was despatched by his Excellency, to direct the company to be in readiness to receive the procession. When I reached the door of the Old South Church, I found that the company was not there. I made inquiries of the constables and other by-standers, as to where they were ; but I could receive no information. I despatched several persons directing them to endeavor to find the company, and request Col. Winthrop to attend immediately. In order to give them time, I remained standing upon the steps until the sheriff informed me that His Excellency required my attendance. I returned into the church, where I found the gentlemen, who composed the procession, waiting ; and I informed the governor that the company were not in attendance. The governor immediately left the church, attended only by his aids and the sheriff, and proceeded through Washington and Winter Streets, on his way to the State House. On turning from Winter into Tremont Street, we met the Cadets. Col. Winthrop was endeavoring to form them in a line facing granite range with an intention, as I presumed, of their paying the customary salutes, and taking up the escort. By the directions of his Excellency, I carried a communication, which I delivered to Col. Winthrop, in person, stating that the governor had no further orders for him that day. After delivering this message, I rejoined the governor, and accompanied him to the council chamber. After the lapse of a few minutes, Capt. Sargent appeared at the door of the council chamber, and inquired if there were any further orders for the company. I communicated the message to the governor, and he directed me to inform Col. Winthrop through Capt. Sargent, that he had no further orders.

2. *Question by Complainant.* Did the company report to the governor at the church as they were ordered, after one half an hour, or at any other time ?

Answer. Not to my knowledge.

3. *Question by same.* How long was it after the services of the church were over, before the procession came out of the church on its return?

Answer. I can't tell exactly ; but should think it was 10 or 15 minutes. It might not have been more than 10 minutes. I could not judge very correctly of the lapse of time, while I stood in front of the Old South. I remained there as I before stated, until I received a message from the governor requiring my return.

4. *Question by same.* When the procession came out, did you see the company or hear its music?

Answer. I did not.

5. *Question by same.* Did you receive any information by the messengers you despatched, where the company was or how long it would be before their return?

Answer. I did not. I do not remember that any of them returned to me.

6. *Question by same.* Did you see or know of any officer or any member of the company being left at the door of the church, to give information where the company was?

Answer. I did not ; I inquired, but received no information.

7. *Question by same.* During the services of the church, did you hear the music of the company?

Answer. I did, about half an hour after we went in, and I believe afterwards. I supposed that the company went away and returned again. I expected to find them at the door when I went out.

8. *Question by same.* Did the members of the council, and the two branches of the legislature follow the governor, on his return to the State House?

Answer. I believe there were one or two persons, but cannot say how many.

9. *Question by same.* When the governor turned the corner of Winter Street, in what manner were the Cadets approaching?

Answer. They were apparently filing from the right ; but they were very much scattered. At the moment Col. Winthrop came in sight, he faced towards his men, and endeavored to form them in a line as they came up, facing the granite range. At the time, I delivered the message before stated, a considerable number of the privates had not reached the station, which they should have occupied in the line.

10. *Question by same.* Was there or not, noise and confusion at the time?

Answer. There was a great deal of noise and confusion at

the time among the by-standers, especially when they perceived that the governor passed the company without accepting their escort.

11. *Question by same.* Was or was not the confusion you have spoken of, such as to separate the governor from the members of his staff and others in his company?

Answer. I can only answer for myself, I rejoined the governor, and walked by his side to the State House. I did not observe any one else. There was a great crowd.

12. *Question by same.* Were the orders you delivered Col. Winthrop received from the governor himself?

Answer. They were.

13. *Question by same.* Was or was not the governor turned from his course by the attempt of the Cadets to form in front of him?

Answer. I should say that he was. At least he was turned from his course by the confusion which arose from the celerity of their movements.

14. *Question by same.* Where was the governor when you rejoined him?

Answer. He was on the side walk by Park Street Church.

15. *Question by same.* After you delivered the message of the governor, dismissing the Cadets, did they or not march up after him to the State House?

Answer. They marched up after him. They were drawn up in line in front of the State House, at the time that Captain Sargent inquired if there were any further orders.

16. *Question by same.* Please state what is the usual place of performing divine service on Election days, and the customary mode of escorting the government on those occasions?

Answer. The Old South Church in Boston is the customary place for performing divine service on Election days. The governor is received in front of the State House, by the company, saluted and escorted to the Old South Church. At the conclusion of the services, he is usually received with the same salutes and escorted back to the State House.

17. *Question by same.* Do you know whether or not the Respondent has been present with the company as a member or officer of the same on any previous day of General Election?

Answer. I have no doubt that he has been, though I cannot positively affirm it, I think he has been two or three years an officer in the company.

1. *Question by Respondent.* How long were you in church on that day?

Answer. I should think more than two hours.

2. *Question by same.* Was it not one of the severest days in respect to cold, during the last winter?

Answer. It was a very cold day.

3. *Question by same.* Was it not so cold that it would have been hazardous to keep men a long time stationary and drawn up under arms?

Answer. I cannot say whether it would have been hazardous, but it would have been very uncomfortable.

4. *Question by same.* Can you state what was the degree of cold?

Answer. I did not look at the thermometer, I cannot state the precise degree of cold.

5. *Question by same.* Has it been usual for the governor to dismiss the corps for any specified time, on their having delivered the escort at the church?

Answer. I should say that it was not customary to dismiss the corps. They are generally ordered to report themselves after a specified time and it is understood that they must be in readiness to take up the escort at any moment after that time elapses.

6. *Question by same.* By whom do you mean it is so understood?

Answer. I always supposed it to be so understood by all the previous commanders of that corps, who have held that situation since I have been in the governor's staff, which is since 1825.

7. *Question by same.* How many persons have been in command of that corps since that time; and what grounds had you for supposing it to be so understood by them?

Answer. I believe only Col. Baker, before the Respondent, I supposed it to be so understood from the circumstance that they have generally acted in accordance with such an understanding, by either remaining in front of the house after such specified time has elapsed, or by leaving some officer or one of the company, an orderly generally, to give them notice of the conclusion of the services; which officer I have not generally seen in the church until the specified time had elapsed. When an officer has not been so left, the company has generally remained in the immediate vicinity of the church, if not in front of it.

8. *Question by same.* Have all the previous commanders exhibited this knowledge by being found uniformly at the door of the church at the close of the services?

Answer. They have always been there or in the immediate vicinity, except in one instance, since I have been in the staff of the governor.

9. *Question by same.* Has it not been usual for the company to your knowledge to march away from the church, during service?

Answer. Always.

10. *Question by same.* How often can you state on your own knowledge, that the company, on returning, have remained to the end of the service?

Answer. As they have generally returned without music, I have not been aware of their presence until I was sent to communicate with them.

11. *Question by same.* Do you mean to state that you know they have generally returned without music?

Answer. I mean to state that I do not remember having heard the music on any such occasion, although from having been frequently attendant upon his Excellency when there was an escort by some other companies, I cannot positively say.

12. *Question by same.* When the company has been ordered to report at the meeting-house at or after a specified time, what has been the usual mode of making that report?

Answer. The usual mode of making that report has been, to be in readiness at the conclusion of the exercises.

13. *Question by same.* Had I ever previously commanded the company of Cadets when performing escort duty?

Answer. Not to my knowledge.

14. *Question by same.* Did you ever before know the Cadets required to perform escort duty at that season of the year?

Answer. No.

15. *Question by same.* What o'clock was it when you delivered the order to Captain Sargent, that the Cadets should report after one half an hour?

Answer. I cannot tell precisely the hour. It was immediately before the commencement of the services in the church.

16. *Question by same.* How long would it have been necessary for the Cadets to have remained exposed to the weather, after their return to the church in one half an hour, till the services were over and the procession was ready to move?

Answer. The services occupied I believe more than two hours, and consequently, if they remained in front of the church, from and after the expiration of the half hour, they would have been there at least one hour and a half.

17. *Question by same.* Do you know for what purpose, or to what distance the Cadets were moving, when you delivered the order to Captain Sargent in Milk Street?

Answer. They had evidently taken up the line of march and were proceeding down the street.

18. *Question by same.* How far down Milk Street did you see the company move?

Answer. After marching by the side of Capt. Sargent, for a sufficient time to deliver my message, I halted long enough to permit the company to pass me. It was more than the length of the company.

19. *Question by same.* Where was the head of the company when you came out of church?

Answer. As I before stated, the company were then countermarching. They formed in line facing the church, with their right nearly opposite the door. Immediately after coming into line, they broke into column and proceeded as I before stated.

20. *Question by same.* How far from the door of the church, was the first company, at the time you gave the said order?

Answer. But a short distance. The moment I perceived they were on the march, I delivered the order as before stated.

21. *Question by same.* Was there not deep snow on the ground at that time, and especially in front of the church?

Answer. According to the best of my recollection, there was.

22. *Question by same.* Does not the side walk widen below the Old South church; and was there not a space from which the snow was cleared off?

Answer. I do not know.

23. *Question by same.* Was there a printed and published order of exercises for that day?

Answer. I believe there was. There is usually one on such occasions.

24. *Question by same.* What exercises were there announced to follow the sermon?

Answer. I cannot say positively. My impression is, there were the words of a short anthem, but whether it was performed or not, I cannot say.

25. *Question by same.* Was there not also a prayer announced to follow the anthem or sermon?

Answer. I presume there was a prayer or benediction.

26. *Question by same.* Do you not remember that the services, after the sermon, were in fact unusually shortened?

Answer. I cannot state.

27. *Question by same.* Are you confident you waited at the door of the church, after the service, so long as 10 minutes?

Answer. I think that 10 minutes elapsed, between the time, when I first went to the door, and *that* when his Excellency left the church.

28. *Question by same.* How long a time elapsed after the sermon, until the services were closed?

Answer. I cannot state exactly, for the reasons I have before mentioned.

29. *Question by same.* How long a time usually elapses after the services are closed before the civil procession is formed and ready to move?

Answer. The governor generally despatches an aid to see whether the company are in readiness, and immediately on his return proceeds to the door. It sometimes happens, that owing to a crowd, a few minutes elapses, before this can be accomplished; not usually more than four or five minutes. On this occasion there was no crowd.

30. *Question by same.* Can you name any of the persons whom you despatched in search of the company?

Answer. I cannot.

31. *Question by same.* Can you state what instructions you gave to any of the persons whom you despatched?

Answer. I can only state generally that I requested them to go in different directions, and apprise Col. Winthrop, that the services had concluded.

32. *Question by same.* Can you name any of the persons whom you inquired of at the door respecting the company?

Answer. I inquired generally of all the bystanders. My impression is, that Mr Peirce the constable was one of them.

33. *Question by same.* What answer did you get from Mr Peirce? Did he or either of the bystanders inform you that the company would be back in a minute or two?

Answer. I do not remember that either of the bystanders could give me any information as to where the company were, or that they made any statement respecting the probability of their return.

24. *Question by same.* Did his excellency wait one moment after you gave him notice that the company were not at the door?

Answer. No. He moved immediately.

35. *Question by same.* Did he pause one instant at the door?

Answer. I believe not.

36. *Question by same.* Did you mean to state in your answers in chief, that while his excellency was at the door, the company were not within sight or hearing?

Answer. I neither saw nor heard them.

37. *Question by same.* Where were you, when you first heard the drums of the company after leaving the church?

Answer. I did not hear the music of the company until after we met them in Tremont street.

38. *Question by same.* Did not his excellency move with great rapidity through the streets after leaving the church?

Answer. Yes. He walked quickly.

39. *Question by same.* Do you remember any persons of the Legislature or Council, who walked with the governor from the church? If yea, name them.

Answer. I believe there were several. Among them was Mr Calhoun, the Speaker, as I believe. I do not remember any other by name.

40. *Question by same.* Was there not deep snow in Tremont Street except on the side walk?

Answer. I do not remember particularly, though my impression is that there was. The side walk had been cleared.

41. *Question by same.* Was the line of the company formed across the side walk, or did the company move over the same, or how near were they to it?

Answer. Col. Winthrop was endeavoring to form the company near the middle of the street, and parallel to the side walk by granite range. It was in passing across the street from the side walk of granite range to Park Street corner, that the governor was turned out of his course. The company seemed to be filing from the right. As fast as they came into their position, they were faced towards granite range. It was the rear of the company coming up to take their places, that turned the governor from the path. He was not going in a right angle across the street at that place, but in the common path. He was turned from his course in the same manner that any person would be, who, in going in one direction, meets persons rapidly moving in another.

42. *Question by same.* Did the governor step out of the beaten path into the snow bank or not?

Answer. According to the best of my recollection, there

was nothing at that part of Tremont Street which could deserve the appellation of a snow bank. The highway at that part of the city is generally beaten throughout. I cannot state precisely whether or not he was *exactly* in the beaten foot path or how far he was driven from it.

43. *Question by same.* Was there or not a beaten foot path in the street, crossing from granite range to Park Street church; and was there not more snow on each side of it than in the path?

Answer. There was a beaten path, but according to the best of my recollection the whole of the centre of the street near which the company was forming, was beaten down to nearly a uniform hardness with the path.

At this point the court adjourned to meet this afternoon at 4 o'clock.

The court met pursuant to adjournment at 4 o'clock P. M. March 14th, 1832.

Present. Brig. Gen. William Peck, President. — Col. Thomas Davis; Col. Charles Lane; Lieut. Col. Abijah Ellis; Lieut. Col. Luther Eaton.

The Respondent was called and answered.

The Complainant was called and answered.

Col. Quincy was again called.

44. *Question by Respondent.* Did the governor begin to cross towards Park Street church in the beaten path?

Answer. I cannot state positively, though my impression is that he did.

45. *Question by same.* Can you state positively, upon your oath, that he once stepped out of that path?

Answer. I think I can. In rejoicing his excellency, I was obliged to follow him for some distance, and he appeared to me to be obliged to quit the path, he would naturally have held, on account of the rapid motion of the Cadets as before stated.

46. *Question by same.* Where did the right of the company rest when forming in line in Tremont Street?

Answer. I should think about opposite the second door from the corner of Winter Street.

47. *Question by same.* Are you acquainted with most of the members of the Cadets and can you name one of them whom you saw cross his excellency's path?

Answer. I am acquainted with most who were formerly members of the Cadets; but there were very few present upon

that occasion, whom I could call by name. I cannot state the name of any person whom I saw cross the path, though I am certain from their uniform, that they were members of the corps. I mean to state positively that some members of the company did cross the governor's path.

48. *Question by same.* Did you hear Colonel Winthrop order his company to present arms as his excellency appeared?

Answer. Not to my recollection.

49. *Question by same.* Did you see them present arms?

Answer. I did not observe that they did.

50. *Question by same.* Did you see two of the company approach his excellency to take their posts as sentinels on each side of him?

Answer. I did not observe that. In going from the State House to the meeting-house two sentinels walked by his side, which is the usual mode.

51. *Question by same.* Is it usual for the Cadets after their return to the State House to form in line and send up for further orders?

Answer. It is usual for the Cadets to form in line, and remain there, until they receive some communication from the governor. It is not usual to send up for orders.

52. *Question by same.* What were the words spoken by you to Col. Winthrop in Tremont Street?

Answer. I believe the words were, the governor has no further orders for you or words to that effect. I am positive that I used the words, "has no further orders for you."

53. *Question by same.* Was Col. Winthrop at that time engaged in attending to a movement of his company?

Answer. He was, as I have before stated, forming his men into line. He had his back to me when I received the message. I passed him on his left hand, and placed myself between him and his company, facing him, when I delivered the message.

54. *Question by same.* Are you confident that I heard and understood your communication?

Answer. I can have no doubt of the fact.

55. *Question by same.* Did you deliver any order whatever from his excellency to me personally in the course of the day except that in Tremont Street? Or did his excellency himself give any to me personally or send any by any other staff officer besides yourself?

Answer. I did not deliver any other that I remember.

His excellency does not usually communicate with the commander of the company except through his staff, and I was the only aid-de-camp on duty that day. No order was communicated except through me to my knowledge.

56. *Question by same.* Can you state any fact tending to show and which at the time led you to suppose that I intended to exhibit any disrespect towards his excellency at either of the times you have spoken of?

Answer. No. I know of no act that I can construe into an intentional disrespect to the governor, unless the same can be gathered from all the facts before stated, taken together.

57. *Question by same.* Was there anything in the manner in which any of these acts were done by me, which you supposed at the time was indicative of disrespect?

Answer. Nothing.

58. *Question by same.* Can you state any fact tending to show, and which at the time led you to believe, that I knowingly and intentionally, disobeyed any order which had been communicated to me or neglected any duty which had been required of me?

Answer. I know of no fact, except those I have already stated.

18. *Question by Complainant.* Were seats reserved for the Cadets in the meeting-house?

Answer. Not that I know of.

19. *Question by same.* Did the governor and those who were with him walk as they usually do, when escorted in the middle of the street, on their return to the State House?

Answer. They did until they arrived nearly opposite to the passage way in rear of the houses in granite range, when the governor went upon the right hand side walk and proceeded round the corner into Tremont Street as I have before stated.

20. *Question by same.* When Col. Winthrop was forming his company, as you have before stated, do you or not know of his having communicated to the governor his intention of resuming the escort?

Answer. I know of no such communication. From my situation I must have known it, had any such been made.

21. *Question by same.* When you saw the Cadets approaching the governor, as you turned the head of Winter Street, were they marching or running?

Answer. They were not marching. I should say the greater part of them were running. They were evidently hurrying into line.

22. *Question by same.* Did they appear to be approaching in column or were they in a scattered condition?

Answer. They were in a scattered condition. My impression was, that they were or had been filing to the right, and that those in the rear were unable to keep pace with those in the front file.

59. *Question by Respondent.* How far was the most distant member of the company whom you saw in Tremont Street from the leading file?

Answer. I cannot state exactly, but my impression is that there were a considerable number of the company as far off as Burnstead Place.

The court adjourned to meet tomorrow morning at half past 9 o'clock.

THURSDAY, MARCH 15, 1832.

The court met pursuant to adjournment.

Present all the members.

The Respondent was called and answered.

The Complainant was called and answered.

The Judge Advocate read the record of yesterday in the hearing of Col. Quincy, who then remarked that the only alteration which he wished to have made in his testimony was to substitute the word "requested," for the word "despatched," when stating what took place after the conclusion of divine service in the church and when he found that Col. Winthrop was not in readiness at the door.

Col. Quincy was again called.

60. *Question by Respondent.* At what place in Tremont Street did you leave his excellency to communicate with the Respondent?

Answer. Immediately after we turned the corner, I should think it was nearly opposite the first door from the corner of Winter Street. I passed to Col. Winthrop and my impression is that the governor proceeded upon the side-walk to the pathway before mentioned, which I should think was between the 2d and 3d doors from the corner of Winter Street. After delivering my message, I rejoined the governor, as soon as I could pass through the crowd as before stated, on the side-walk by Park Street church.

61. *Question by same.* Do you not remember that I said to you, I do not understand your order, or to that effect?

Answer. No. I do not. It was a message that I considered required no answer.

62. *Question by same.* Did his excellency appear in a civil or military dress?

Answer. In a civil dress.

63. *Question by same.* Was his honor the lieut. governor in the procession that day? And is the lieut. governor the father of the Respondent?

Answer. His honor the lieutenant governor was in the procession, going to the church. I do not remember seeing him after the close of the services. He is the father of the Respondent.

64. *Question by same.* At what hour of the day, did the Cadets last report themselves for orders at the State House, and at what hour did you serve the order for the arrest?

Answer. I cannot state precisely. My impression is, that they reported themselves the last time about half past 3, or between that and 4 o'clock, P. M. I served the order for the arrest about half past 6, or 7 o'clock. Immediately after making the arrest I went to Mr Green's.

The Hon. Josiah J. Fiske was called by Complainant and sworn.

1. *Question by Complainant.* Are you a member of the executive council? Did you move in the procession on the last day of General Election? Please state any facts pertinent to the case now in hearing.

Answer. I was and still am a member of the executive council. I moved in the procession from the State House to the meeting-house, and I returned in the procession from the meeting-house to the State House. The procession was somewhat interrupted after leaving Winter Street. The ranks of the procession were so much broken there, that for some moments I lost sight entirely of the governor and of the sheriff. The council had not then been adjourned for that day, and as a member of it, I recollect I was very anxious to keep in company with the council and the governor, until they arrived at the State House, supposing it an imperative duty so to do. When I lost sight of the governor, I was walking arm in arm, with the Hon. Mr Locke, a member of the council. The secretary of the commonwealth was next in the rear. I perceived while I was in the crowd, that the governor had passed the company of Cadets and the crowd, and was walking on the side-walk in Park Street. I broke away from Mr Locke and advanced as rapidly as possible to overtake the governor. While passing

through the crowd, there was a general shout, though I did not then know the cause. After I had passed the crowd, the first person, that joined me in the procession, was the President of the Senate. We then walked together nearly to the head of Park Street, where he left me, and Mr Locke and Mr Bangs came up and again joined the procession. We proceeded to the council chamber, but nearly all the members of the council had got lost. I think there were not more than three who arrived at the council chamber with his excellency. After arriving at the council chamber, I passed into another room, and when I returned, there was a member of the company, whose name I did not know, who was in the act of delivering some message. I think the table was between this person and the governor, and I should think he was addressing Col. Quincy. I heard the governor then say that he had no further orders to give.

2. *Question by same.* What was the cause of the promiscuous breaking up at the head of Winter Street?

Answer. It was the crowd, that came from the north through Tremont Street.

3. *Question by same.* Where was the company of Cadets at that time?

Answer. It is my impression that they were in advance of the crowd, between Park Street meeting-house and the corner of Winter Street.

4. *Question by same.* In what condition was the company at that time?

Answer. Everything was in such a state of confusion at that time, that I was unable to distinguish what was the particular situation of the company or what were their movements. I mean that the company the crowd and the procession were all in such a confused state, that I should not at that time, have been able to state, what was the particular condition of the company.

5. *Question by same.* Did any part of the company attempt to form in front of the governor? and when?

Answer. Immediately after I turned the corner of Winter Street, I lost sight of the governor, and did not see him till he had passed the company, so that I cannot say what the relative condition of the company and the governor was.

6. *Question by same.* Do you know, whether or not any members of the company intervened between the governor and other members of the procession at the head of Winter Street?

Answer. The governor and procession moved up the centre of Winter Street and it is my impression that there was some obstruction at the head of Winter Street, which caused the governor and the sheriff to turn out of the middle of the street and go upon the side walk at the corner, I believe it was a snow bank. He then passed into Tremont Street to cross over. It was then that I lost sight of him. How he got past the crowd I do not know, but the company and the crowd were between him and that part of the street where I was.

7. *Question by same.* Was it not a scene of great confusion?

Answer. It was.

8. *Question by same.* Can you tell whether the company were in column, in line or in a scattered condition?

Answer. I think they were in a scattered condition when I first saw them, which was soon after I turned the corner of Winter Street; but they might have formed afterwards. The number of persons between me and them was immediately very large, so that I could not distinguish their movements or observe the situation of the governor.

9. *Question by same.* Was the lieutenant governor in the procession at all, and if so, was he in it on its return from the church?

Answer. He was in the procession from the council chamber to the meeting-house: but not from the meeting-house to the council chamber. He left the meeting-house as soon as the services were through, and before any attempt was made to form a procession.

10. *Question by same.* Were the usual services of the church cut short after the sermon?

Answer. According to my understanding they were not cut short at all.

11. *Question by same.* When the procession came out of church, were the Cadets in sight, or did you hear their music?

Answer. I did not hear any music, or see any of the Cadets until after the procession had arrived at the head of Winter Street.

12. *Question by same.* How large was the procession which entered the church, and how many remained there waiting for the Cadets to come.

Answer. It is my impression that the procession to the meeting-house consisted of the greater part of the members of the different branches of the Legislature. The greater part remained until the time when the governor went out of the meet-

ing-house. Some might have gone out at the east and west doors, whom I did not see.

13. *Question by same.* How long do you suppose it was after the conclusion of the services, before the governor went out of the door of the church?

Answer. It was a much longer time than usual. A considerable degree of impatience was manifested by the members of the government; but I cannot tell precisely how many minutes it was. The question was asked several times around me "Where are the Cadets?" and before Col. Quincy returned, the question was asked "What has become of him?" Why does he not return?"

14. *Question by same.* Did you hear Col. Quincy's report to the governor in the church?

Answer. I think I did. I cannot state the exact language of the answer, but the meaning of it was, that he felt unwilling to return, until the company had arrived; and I recollect that Col. Quincy said, the company would feel very much mortified; the governor said nothing, to my recollection unless it was, let us proceed or some such expression.

1. *Question by Respondent.* Do you mean to state as a fact that the company was not in military order, when you arrived at the head of Winter Street, or that the general confusion was so great, that you could not observe what were the movements of the company?

Answer. I mean to state, the company was in a scattered condition, and that the crowd was so great, that I could not distinguish their movements afterwards.

2. *Question by same.* Do you mean to say that the corps was not in military order, when you say they were in a scattered condition? or that they were divided as a company might be in marching or filing from column into line?

Answer. They were in a scattered condition. If they were in a military condition then, it was so indistinct in the crowd, that I could not tell what that military condition was. I do not mean to say but that all the military movements intended to be performed were properly performed; but the crowd was so great that I could not see.

15. *Question by Complainant.* Have you held any commission in the militia, if so what and how long.

Answer. I held a commission as aid to Major General Crane, but do not know how long.

3. *Question by Respondent.* Do you profess to be acquainted

with battalion manœuvres and drill, according to the system prescribed by the United States?

Answer. I do not profess to be very much skilled in those manœuvres. It is about six years since I was discharged.

The court adjourned to meet at half past 3 o'clock this afternoon.

TUESDAY AFTERNOON, 3½ o'clock, MARCH 15, 1832.

The court met pursuant to adjournment.

Present. Brig. Gen. Wm. Peck, President. — Col. Thomas Davis; Col. Charles Lane; Lieut. Col. Abijah Ellis; Lieut. Col. Luther Eaton.

The Respondent was called and answered.

The Complainant was called and answered.

Complainant offers in evidence a letter addressed to His Excellency Levi Lincoln and signed "Grenville Temple Winthrop," which is annexed and is marked (10), as follows:

(10)

BOSTON, 4 JANUARY, 1832.

To His Excellency the Commander in Chief.

SIR, — I had the honor to receive an order from your excellency this evening, through the office of the adjutant general arresting me for disobedience of orders and neglect of duty. The order* which I received (not, however, till Monday morning last) specified that I should report myself at the State House on Wednesday, the 4th January, at M., and there wait for further orders. I was there at the appointed hour. The escort was delivered duly at the church and I was ordered by Lieut. Col. Quincy, through my adjutant Capt. Sargent, to report myself at the church in half an hour. I did so, and remained there 15 or 20 minutes. No order came. I was then compelled by the intensity of the cold to march the company about town for exercise. I returned in 15 minutes to the church, but still no order came from your excellency; I continued to wait until the members of the company informed me "that they could not handle their muskets," that "their fingers had lost all feeling." I then marched the company to the basement room of the Exchange Coffee House halted it and allowed not a man to leave the ranks, as I was momentarily expecting to be summoned to the church.

* The general order for the parade of the corps on Election day.

I should here inform your Excellency that a man was stationed in the church, to report to me the moment at which the sermon closed. There is another reason, beside the intensity of the cold which induced me to leave the church the *last time*. I was requested to make way for a funeral, which was just assembling in Milk Street and which extended from Federal nearly to Washington Street. It would have been impossible to have conducted the funeral with decency if I had remained with my company in front of the church. As it was, the horses were alarmed and considerable confusion ensued. It is proper that I make known to your Excellency another material fact in this matter. The band told me that they *must* go to some fire and *thaw* out their instruments, or they could not play another note. It is my humble opinion that your excellency will scarcely attribute to me either "disobedience of orders" or "neglect of duty" after this explanation. I make this statement in order that your excellency may know all the facts in the case. The injury (I must make use of this word, for no other can express my feelings) *has been done me*: therefore I cannot be accused of a desire to rid myself of any penalties which may be inflicted upon me by an organized court martial. Whatever punishment a court martial may inflict upon me, I shall bear with the firmness which has carried me through many trials and perplexities, and which I often thank my God for having given me. In conclusion, allow me to beg of your excellency to excuse the appearance of this letter. It has been written after a pretty hard day's duty, and may be, nay, I doubt not, is, extremely faulty.

I have the honor to be with the most proper respect,

Your excellency's most obedient servant,

GRENVILLE TEMPLE WINTHROP.

Late commanding officer, I. C.

WALNUT ST.

His Excellency, LEVI LINCOLN,

Governor and Commander in Chief, Walnut St.

Major Aaron Davis Capen again called.

8. *Question by Complainant.* Do you board in the same house with the clerk of the Independent company of Cadets?

Answer. I do.

9. *Question by same.* Was the package which you before stated, you found lying upon your table, a sealed package or not?

Answer. I cannot say certain, but am inclined to think it was not.

10. *Question by same.* In whose hand writing was it?

Answer. I do not know.

11. *Question by same.* Was the word "militia" marked on it, as usually is on documents, coming from the Adjutant General's office?

Answer. I do not know.

12. *Question by same.* What did that package contain?

Answer. It contained a General Order directing Maj. Gen. Aaron Capen to order the Cadets to perform escort duty on the day of General Election.

13. *Question by same.* To whom was the package directed on the outside?

Answer. I do not even know that.

14. *Question by same.* How came you to open and read it?

Answer. I opened it, as I should have opened any other document which I was told was for me.

15. *Question by same.* Do you or do you not know whether that paper was ever in the hands of Col. Winthrop?

Answer. I do not.

16. *Question by same.* Did you ever have any conversation with Col. Winthrop about it? if so, state what.

Answer. I have. I saw Col. Winthrop during the week after the date of the order, and before the delivery, more than once, I think twice; he asked me if I had the order, I told him no, I had not seen it. He further stated to me that he must have the order soon, or he could not get out his company, or at least a respectable company in point of numbers. He further requested me to transmit that order directly to him. I believe this was on Tuesday the 27th Dec. 1831. I told him I would get the order if I could for him. Some business called me to the Adjutant General's office, and I inquired, if there was any orders for Gen. Capen, and I received an answer from Col. Hall, that there was no order nor document for Gen. Capen. This was on the same Tuesday before 1 o'clock. On the next Wednesday, I called at the post office in Dorchester, in order to ascertain if there were any documents there for Gen. Capen; I received no documents, nor found any there. I called on Gen. Capen in the evening of Wednesday and received no order. He stated to me that he had received none. On Thursday, as I think, I saw Col. Winthrop, and told him that I had seen no order for him, and made this remark, that I thought the Cadets would not be called out, as I had received no order, and none had been received by the Major General. He said he must have the order soon, or his men could not be called out

17. *Question by same.* Do you state upon your oath, that that was all Col. Winthrop said?

Answer. It was at that time.

18. *Question by same.* What other conversations have you had with Col. Winthrop on this subject?

Answer. I saw him but once, besides what I have stated. It was at the gate of the Bowdoin House. I cannot say whether it was Monday evening the 2d, or Tuesday the 3d of January, and Col. Winthrop stated to me that he had received the order too late, or in words to that effect; and I think he added, that he could not compel his men to come out on that day, or I said something to that effect. I added that I had transmitted the order as soon as I could, or at least as soon as any reasonable man could expect. I said also that if any blame was to come on any body, I supposed it would come on to me, from the fact that I had not transmitted the order on Saturday.

19. *Question by same.* Did, or did not, Col. Winthrop ever tell you, that he had seen that order before Friday night?

Answer. He did.

9. *Question by Respondent.* Was the order which Col. Winthrop told you he had seen before Friday night, an order to Gen. Capen, or was it an order to him?

Answer. It was an order directed to Gen. Capen, directing him to order Col. Winthrop to perform escort duty. It was the general order of the 24th Dec. But the division order had not been annexed.

20. *Question by Complainant.* Did you annex the division order to the general order on Friday evening?

Answer. I did.

The Respondent submits a motion which is annexed and is marked (11), as follows:

(11)

The Respondent excepts to the general order of the 24th of Dec. 1831, as not binding upon him or the company under his command, it being proved that the same was not duly transmitted to the Respondent, either by delivery thereof to himself or by being left at his residence, at least four days before the day appointed therein for the duty therein ordered.

And the Respondent founds his said exception on the 18th Sec. of the statute of 1809, Chap. 108, and in the following words thereof; more particularly, viz: "And no notice shall be legal for any company inspection or training, or for any bat-

talion, regimental, brigade, or division inspection or review, unless the same shall be given at least four days previous to the time appointed therefor."

And although the Respondent is aware that the said provision is morè particularly intended to apply to the notification of privates by order of the captains of companies, he respectfully insists, that by necessary implication, no order to a captain to parade his company, can be legal, unless given to him in such time as to enable him to give legal notice to his company to appear accordingly.

GRENVILLE TEMPLE WINTHROP.

The court adjourned to meet tomorrow morning at 10 o'clock

FRIDAY MORNING, MARCH 16, 1832.

The court met pursuant to adjournment.

Present. Brig. Gen. William Peck, President. — Col. Thomas Davis; Col. Charles Lane; Lieut. Col. Abijah Ellis; Lieut. Col. Luther Eaton.

The Respondent was called and answered.

The Complainant was called and answered.

The Judge Advocate read the record of yesterday in presence of the witnesses who testified on that day.

The Complainant read a reply to the motion submitted by the Respondent yesterday on the subject of notice, which is annexed, and is marked (12), as follows :

(12)

I N C O U R T M A R T I A L ,

MARCH 16, 1832.

The Complainant in reply to the Respondent's objection to general order for want of notice answers,

1. That the law requiring four days' notice specifies the cases in which that notice shall be given, viz: for company inspection, and trainings, and reviews; and does not thus comprise the notice to escorts, funeral services and other emergencies.

2. That if it did, it is in proof that the Respondent received the division order founded on the general order of the 24th Dec., two days before the day of parade, if not before.

3. That the Respondent on the 28th Dec. by letter, requested the Complainant to send him "the order for the Cadets to parade on Election day, and promised to send it to Gen. Capen,

that it might come regularly down, or if Complainant preferred it, the order might be sent to Major Capen, aid de camp to the general, at the Old Bowdoin House in Beacon Street, who would see that it should be sent down," as by the Respondent's letter in the case appears.

It is in proof that a duplicate original of the general order of the 24th Dec., was made out the next morning by the Adjutant General, and directions left, to be sent that forenoon; and although Mr Kuhn, the messenger, cannot recollect delivering any particular package among the many laid upon the table for him to deliver at that and other times, yet as it is in proof that that duplicate original was in the hands of Major Capen on Friday, and that Col. Winthrop had had it in his possession before that day, when it was found by Major Capen on the table where he and the clerk of the Cadet company both board, the Complainant conceives, if the Respondent did not procure a division order to be sent regularly down, it was his own fault, and he has therefore no reason now to complain for the want of that notice which he failed to procure according to his promise.

4. That the Cadets were ordered out for escort duty by their commander, in fact, on Saturday the 31st Dec., according to the printed notice in this case; and that the Respondent did parade with his company in front of the State House, as ordered in said general order, at 12 o'clock, on Wednesday, and there, after having reported himself for duty according to it, received the special orders of the commander in chief relating to the escort, took it up, according to them.

Wherefore the Complainant conceives that the Respondent's objection ought not to prevail.

W. H. SUMNER.

The Respondent replied according to the paper annexed marked (13), as follows:

(13)

RESPONDENT'S REPLY.

1. This was a "*company training*"—escort is not an "emergency" dispensing with the usual time of notice. Those emergencies are cases of urgent necessity for the "general" defence and safety of the Commonwealth"—whereas "escort" is termed in law "a voluntary service."

2. The second reason offered by the Prosecutor is simply

an admission of the fact stated in the Respondent's motion, and therefore no argument against it.

3. As to the Respondent's promise to forward the general order, it appears by the evidence, that the Adjutant General did not rely on that as the mode of forwarding the order to the Major General. He had before sent it in the usual course, and Col. Winthrop was under no obligation to act in the matter. His failing to send forward the duplicate order, did not impede its usual course.

4. The company orders issued were merely voluntary and intended to assist the Respondent's superior officers — no rights of the Respondent's are waived by them.

GRENVILLE TEMPLE WINTHROP.

The court retired to deliberate. The court returned and decided that the objection of the Respondent on the ground of insufficiency of notice was overruled.

Dr Joshua H. Hayward called by Complainant and sworn.

1. *Question by Complainant.* Did you see the Cadets on Election day? If so, when and in what condition?

Answer. I first saw them at the Old South church. Perceiving that they had made a mistake as to time, I was induced to follow them. They marched to the corner of Bromfield's Lane, passed rapidly up the lane at the tap of the drum, and formed their company in front of the granite range. At the same time the governor seemed to pass from Winter Street.

2. *Question by same.* Did the Cadets run or march through Bromfield's Lane?

Answer. They ran at the beat of the drum.

3. *Question by same.* What was their condition as to confusion or order?

Answer. I was not near enough to them to judge, I was some rods behind them.

4. *Question by same.* Could you see their condition?

Answer. I could not distinctly, for the street was narrow and crowded with people.

1. *Question by Respondent.* Have you at any time held any military office? if yea, what?

Answer. I served as a private in the Cadets, and was surgeon in the battalion of Artillery of the Boston Brigade.

2. *Question by same.* Do you know the distinctions between common time, quick time and double quick time? If so describe them.

Answer. I know there is a distinction between them, but precisely what the distinction is I do not know.

3. *Question by same.* When you say that you saw the Cadets run up Bromfield's Lane, do you mean to be understood as saying, that they moved otherwise than in military double quick time? If yea, state how otherwise.

Answer. To the best of my recollection, they moved to Bromfield's Lane in double quick time, and then increased into a run.

4. *Question by same.* What is to your apprehension the difference between moving in double quick time and running?

Answer. I take it double quick time may be marched by music, running cannot.

5. *Question by same.* Then do you understand that running by the tap of the drum is not moving in double quick time?

Answer. I never so understood it.

5. *Question by Complainant.* Were or were not the Cadets and the crowd mixed together, at any time when you saw them on that day?

Answer. The street was so narrow, and I was so far behind them, I could not judge. They were surrounded by the crowd, but whether mixed with it or not I cannot say, though my impression is, that the Cadets were together and the crowd by their side.

6. *Question by Respondent.* Do you remember the state of the weather on the 4th of January last? and would it have been proper and safe for men to stand exposed under arms on that day?

Answer. It was excessively cold on that day, one of the coldest we had last winter. I should think in the circumstances of the case, that men could not stand long exposed without extreme hazard.

Question by the Court. Were they marching by column or by file in going up Bromfield's Lane?

Answer. I don't recollect. Besides, they were so surrounded by the people, who came out of the shops, that I could not see.

Question by same. Did you at any time notice, whether the left flank was in a disorderly state?

Answer. I saw one individual, and only one, lagging behind. This was in Tremont Street.

6. *Question by Complainant.* Is there or not a tavern in Milk Street, nearly opposite the Old South church?

Answer. There is, I believe.

7. *Question by Respondent.* Is there any hall or large room in the tavern in Milk Street?

Answer. I don't know.

8. *Question by same.* Is that a tavern or boarding-house?

Answer. I don't know, but my impression is, that it is a tavern.

9. *Question by same.* Was the walking slippery on the 4th of January last?

Answer. I think it was.

10. *Question by same.* When did you cease to be a member of the company of Cadets, and before you left them was the Exchange Coffee House their usual rendezvous on days of General Election?

Answer. I ceased to be a member in 1825. They had no other place of rendezvous, when I met with them, that I recollect.

Mr Josiah Baldwin called by Complainant and sworn.

1. *Question by Complainant.* Are you a constable? Was you an attendant at the Old South church on last Election day?

Answer. I am, and attended at the Old South church on last Election day.

2. *Question by same.* Were there seats provided for the Cadets in the church?

Answer. There were.

1. *Question by Respondent.* Has it of late years, been usual for the Cadets to attend the services in the church?

Answer. They sometimes do, but not generally.

2. *Question by same.* Please state how lately you have seen them in church on Election days.

Answer. I have seen them there on Election day, but cannot tell how lately.

3. *Question by same.* Are you positive of that?

Answer. I am. I have been in the office 14 years, and have seen them there during that time, but cannot tell how lately.

4. *Question by same.* Were the seats kept for the Cadets?

Answer. They were. How long they were kept, I cannot tell.

3. *Question by Complainant.* Do you know whether they were kept until after the procession came in?

Answer. I do not.

Question by the Court. Do you know whether Col. Winthrop was notified that seats were reserved?

Answer. I do not.

Mr Edward Stow called by Complainant and sworn.

1. *Question by Complainant.* Are you a clerk in the Adjutant General's office?

Answer. I am.

2. *Question by same.* Do you recollect when the general order of the 24th Dec. last was issued?

This question was objected to as irrelevant by the Respondent, and then withdrawn.

1. *Question by Respondent.* Do you know when the letter which I wrote to the governor was filed in the Adjutant General's office?

Answer. No.

The Adjutant General was again called.

9. *Question by Respondent.* Is the filing of the letter from me to the governor in your hand writing?

Answer. It is.

10. *Question by same.* When was the same received by you, and when was it filed?

Answer. I think it was received by me, the day but one after the date, but I am not positive. The indorsement was made upon it at the time I received it, and it was put on the file on my own table where I keep all letters and papers relating to matters in controversy. They are not *filed away*, until after the controversy is settled. It is a file, which relates solely to public affairs, and is indorsed "Militia."

11. *Question by same.* Was that letter put upon the files of the office by any special directions to you?

Answer. It was.

12. *Question by same.* Is it according to military usage for a superior officer, to receive as official any communication from an officer under arrest?

Answer. I don't know. I never knew a case like it.

Question by Judge Advocate, at the request of Complainant. Do you know of any impropriety in so receiving it?

Answer. I do not, for the reason, that if the commander in chief had been satisfied with the apology or statement contained in it, he might have made it the ground of discharging him from arrest.

Mr Newell A. Thompson again called.

1. *Question by Respondent.* Is the paper you hold like the company orders for warning the Cadets? (marked 14) as follows:

INDEPENDENT CADETS.

The Independent Company of Cadets are ordered to assemble at their armory, on Wednesday, the 4th day of January next, at 10 o'clock, A. M. in uniform complete, for escort duty.

The roll will be called punctually at half past 10 o'clock.

Per order of Lieut. Col. Grenville Temple Winthrop.

N. A. THOMPSON, *Clerk.*

DECEMBER 31, 1831.

N. B. The corps will wear yellow buckskin gloves, a pattern of which may be seen at Messrs S. & A. H. Rhoades'.

No plumes will be worn.

Answer. Yes.

2. *Question by same.* When were those orders distributed?

Answer. They were given by me to a boy to distribute on Saturday, I think it was after dark. I directed him to distribute as many as he could. It was a stormy evening. The person whom I usually employed to distribute orders was at that time sick, which was my reason for giving them to a boy.

3. *Question by same.* Do the company orders usually bear on their face "by order of the commander of the company," or "by order?"

Answer. They are usually "by order." That depends however entirely on myself. I was requested by Col. Winthrop to issue the order with his name on the face. His reason was the lateness of the date. I think he stated that he had received no official order at that time.

4. *Question by same.* Was this the first occasion upon which Col. Winthrop had appeared as Col. commanding the Cadets?

Answer. It was. I do not know of his ever commanding the company before on any public occasion, though he has at drill.

5. *Question by same.* What means has the Captain of the Cadets to compel the attendance of members, besides those provided by law?

Answer. I think there is a clause in the constitution, authorizing the commander to call out the company on such occasions as he may deem necessary. I know of no means he has to compel them.

6. *Question by same.* Is the company, so constituted that

the fines provided by law, or by their by-laws have much practical effect in compelling the appearance of members?

Answer. I think the fines have not much effect, so far as I can judge.

7. *Question by same.* Do you know that it was peculiarly difficult to get members of the company to come out on this occasion?

Answer. I know it was.

8. *Question by same.* Do you know that great pains were taken by me to induce members to come out?

Answer. I do.

9. *Question by same.* Was a new uniform provided by the company suited to that season of the year?

Answer. They obtained a winter dress, which they adopted as a new uniform.

10. *Question by same.* Do you know whether I incurred great expense in procuring uniforms for men, who would not otherwise have come out?

Answer. I do not of my own knowledge. I know you urged men to come out, who were not on the roll for duty.

11. *Question by same.* How many were out on that day? How many were *active* members of the company? How many were volunteers?

Answer. Twenty non-commissioned officers and privates. Those were active members. There were fifteen volunteers. Nine of the fifteen never had any connexion with the company before to my knowledge.

12. *Question by same.* How many active members were on the roll of the company at that time?

Answer. I cannot tell without looking at the roll.

13. *Question by same.* Was the weather on that day intensely cold, and was there much suffering from that cause?

Answer. It was intensely cold. As to the last I can say that I suffered very much. I took a severe cold and was confined to my room seven or eight days and had medical attendance. Whether it was from that cause alone, I cannot say; but it was immediately after.

14. *Question by same.* Did Col. Winthrop refuse to give permission to men to quit the ranks, according to your knowledge, on account of the cold?

Answer. While standing in line in front of the Old South, after returning the second time, I asked permission of Col. Winthrop to leave the lines for a short time to enable me to go

to my boarding-house, No. 13 Beacon Street, to get my overshoes, stating that my feet were very cold, and that I was exposing my health by standing there. He refused, on the ground that I should not have time, as he feared, before my return the services would be concluded, and that upon no consideration, would he have the company absent, when the services were concluded; and if I left, others would wish to leave.

15. *Question by same.* Upon the return of the company to the meeting-house, the first time, how long were you kept drawn up?

Answer. I cannot say the precise time. I think ten minutes.

16. *Question by same.* How far did you march and how long were you gone before a second return?

Answer. We marched down Milk Street, through Federal Street to Franklin Street, up Franklin Street, to Washington Street, and then to the Old South church. I cannot say the precise time.

17. *Question by same.* How long did you wait the second time?

Answer. I should think about the same length of time as before, though I cannot tell exactly.

18. *Question by same.* Did you wait each time as long as the men could stand the cold?

Answer. I can answer only for myself. We waited each time longer than I could stand the cold, without experiencing considerable inconvenience from it.

19. *Question by same.* How far did you go when you marched away after the second return?

Answer. We went by the shortest distance to the Exchange.

20. *Question by same.* What was done with the company at the Exchange?

Answer. They were marched into the basement hall and there ordered to remain with arms in hand.

21. *Question by same.* Was refreshment distributed among the men?

Answer. None to my knowledge.

22. *Question by same.* How long did you remain there, and what induced you to remove?

Answer. The length of time I am unable to specify. I should think not more than ten minutes. The order of the commander was given upon the arrival of a messenger from the church stating that the sermon was ended. I don't know who the messenger was.

23. *Question by same.* Did the company march thence immediately and in quick time to the meeting-house?

Answer. They did.

24. *Question by same.* Did you when in Milk Street, see his excellency or some of his suite at or near the door of the meeting-house?

Answer. I don't remember that I did, though my impression is that I did, somewhere near the door of the meeting-house. I am certain I saw some of them between Milk and Winter Street.

25. *Question by same.* Did the company move through Bromfield's Lane in regular double quick time?

Answer. They moved in column, through Bromfield's Lane in double quick time, and as regular as the travelling would admit.

26. *Question by same.* Where did the company first halt, after passing through Bromfield's Lane?

Answer. I don't distinctly remember.

27. *Question by same.* Did they move from the head of Bromfield's Lane toward Winter Street, in quick or in double quick time?

Answer. My position was on the left of the second company. The two first companies moved in quick time. By first and second companies I mean first and second companies in marching order; of the rest I cannot speak.

28. *Question by same.* Was you in your place in line, when his excellency turned the corner from Winter into Tremont Street?

Answer. I was in my place in line, when I first saw the Adjutant General, who was the only individual of the staff I distinguished.

29. *Question by same.* Were the rest of the company in line?

Answer. I don't distinctly remember, my impression is they were.

30. *Question by same.* Did you present arms by order, when you first saw the Adjutant General? If so, by whose order?

Answer. I presented arms by order, about the time I saw the Adjutant General. By whose order I cannot say, I think I heard the order. I know I presented arms and should not have done it without order.

31. *Question by same.* Opposite what point in granite range, did you stand?

Answer. I was not particular to observe the point.

32. *Question by same.* Was there a great crowd about the company at the time and much confusion in the crowd?

Answer. There was a great crowd about the company at the time, consisting mostly of boys, who were very noisy.

33. *Question by same.* Was the company at the time, when you presented arms, in military order or in a scattered condition?

Answer. After they presented arms they were, and remained in military order, until they were dismissed; but I do not mean to be understood as saying they were not in military order before they presented arms, because I did not look behind me to see.

34. *Question by same.* Had the company been at any time previous, so far as you know, in a scattered condition?

Answer. They had not, no more than was absolutely necessary in marching double quick time in a slippery road.

35. *Question by same.* Was the snow where you were drawn up in Tremont Street beaten down hard and smooth like a path or not?

Answer. It was not, to the best of my recollection.

36. *Question by same.* Did you or any member of the company to your knowledge, at any time on that day, cross his excellency's path or turn him from his course?

Answer. I did not myself, nor did I know that any member of the company did.

37. *Question by same.* Had the company previously to this time, had a company training since the preceding May inspection?

Answer. They paraded three times, exclusive of drills, and including the excursion to Worcester.

38. *Question by same.* Had the weather grown much colder, when you returned to the Old South, than it was when the procession entered it?

Answer. I felt it much more sensibly.

39. *Question by same.* Did the company halt, after marching away the first time from the church?

Answer. After delivering the escort, they marched through several of the principal streets to the Exchange, but whether they halted I do not remember, though my impression is they did not.

40. *Question by same.* Do you remember a countermarch in Milk Street after delivering the escort?

Answer. I do not. After delivering the escort we marched down Milk Street.

This day Sergeant Rhoades having requested to be dismissed from further attendance on this Court Martial, Sergeant Ira Eldridge was detailed and attended the Court.

SATURDAY, MARCH 17, 9½ o'clock, 1832.

The Court met pursuant to adjournment.

Present, Brig. Gen. Wm. Peck, President. — Col. Thomas Davis ; Col. Charles Lane ; Lieut. Col. Abijah Ellis ; Lieut. Col. Luther Eaton.

The Respondent was called and answered.

The Complainant was called and answered.

The Judge Advocate read the record of yesterday.

The Respondent offered the records of the company of Cadets in evidence to show what has been the usual mode in which escort duty has been performed by said company.

To this the Complainant objected, and the court gave him time to reduce his objection to writing.

Mr Thompson was again called.

6. *Question by Complainant.* Do you know who left the general order of the 24th Dec., on the table, at the house where Major Capen boarded, on Friday evening? and if yea, who was it?

Answer. I either laid that order on the table or gave it to Major Capen, I can't positively say which.

7. *Question by same.* From whom did you receive it? and when?

Answer. From Col. Winthrop. I received it on Friday the 30th Dec., last, before two o'clock in the afternoon. Col. Winthrop gave me this order in his office — said he had waited and received no order, and he had sent for the order himself. He directed me to give it to Major Capen as soon as I saw him.

8. *Question by same.* How long have you been clerk of the Cadets? and how long a member?

Answer. Since October, 1830, and have been a member since March, 1830.

9. *Question by same.* What office did Col. Winthrop hold in the company previous to his election as commander of it?

Answer. The office of Adjutant.

10. *Question by same.* Has he been present with the company when on escort duty.

Answer. He has with one exception since I have been a member. That exception was May 25, 1831.

11. *Question by same.* What was the cause of the difficulty of getting the members of the company to come out on Election day?

Answer. I don't know.

12. *Question by same.* Had you then recently had an election of officers?

Answer. We had.

13. *Question by same.* Do you know what number of the Cadets turned out under Col. Baker, the last time he commanded said company?

Answer. Thirtyfour privates and seven non-commissioned officers.

14. *Question by same.* When was it that the company voted to have a new uniform?

Answer. November 2d, 1831.

15. *Question by same.* Is it usual or not, for the commanders of the Cadets to use their influence to get the honorary members, and others who usually do not turn out with them, to come out on days of public parade?

Answer. I don't know what has been the practice with former commanders. After Col. Winthrop's election, and previous to the last parade, I have known him to urge honorary members to turn out.

16. *Question by same.* When was your company last inspected?

Answer. Dec. 30th, 1831.

17. *Question by same.* How many members did it then contain?

Answer. Eightyone, according to the abstract.

18. *Question by same.* When you went to the Exchange Coffee House the last time, did or did not the men remain under arms?

Answer. They did remain under arms, so far as I had an opportunity of observing. They stood round the room in military order. The room was not large enough to allow them to stand in line.

19. *Question by same.* What streets did you come through to the church from the Exchange Coffee House the last time?

Answer. I think through Congress and Milk Streets.

20. *Question by same.* Do you know that a messenger came to the Exchange?

Answer. Not of my own knowledge.

21. *Question by same.* In what order did you march to the church?

Answer. In column.

22. *Question by same.* Are you sure that you saw the governor, or any of the officers of his military suite in Milk Street?

Answer. It is my impression that I did. I am sure I saw some of them after we turned the corner into Washington Street.

23. *Question by same.* Did you see the governor at the head of Winter Street?

Answer. I did not distinguish him from any other person.

24. *Question by same.* If you did not see him, how do you know that you did not cross his path or interrupt him?

Answer. I know the governor when I see him, and if I had run afoul of him, I should have known it.

25. *Question by same.* By what order did the company form line opposite granite range?

Answer. I heard no order to form line.

26. *Question by same.* In what position was the company when you heard the order to present arms?

Answer. I presume the company would not have been ordered to present arms, except they were in line.

27. *Question by same.* Do you know the position they were in?

Answer. I think I do. They were in line, I think.

28. *Question by same.* Were they in parade order?

Answer. If they were in line, they were in parade order.

40. *Question by Respondent.* Will you describe in what part of the Exchange is the basement hall, to which the company was marched?

Answer. On the north of the front entrance.

41. *Question by same.* Is the shortest route from that room to the church, through Congress Street?

Answer. I never measured the distance; it appears to be.

42. *Question by same.* Would it not be necessary to go up one flight of steps and down another, to go out of the other door of the Exchange?

Answer. It would.

43. *Question by same.* Were you ordered at the head of Winter Street to wheel by companies?

Answer. I don't recollect any such order. I recollect no order by which we came into line.

44. *Question by same.* If you heard no order, why did you take your place in line, and how did you get there?

Answer. I knew the object of the commander. I saw others who were before me forming into line, and I consequently

formed there myself. I don't know how I got there. My impression is by files from the right.

45. *Question by same.* How many active members of the company went out on their Worcester excursion?

Answer. Twentyfour non-commissioned officers and privates.

46. *Question by same.* Was I present on the Election day of 1830?

Answer. You was present on that Election day, as Adjutant of the corps.

47. *Question by same.* Had I ever before been present with the company?

Answer. Not to my knowledge.

48. *Question by same.* When I handed you the order on Friday, Dec. 30th, did I then state to you, that I had just received it?

Answer. I don't recollect the precise language?

49. *Question by same.* In that conversation were great complaints made that no order had been issued?

Answer. There were.

29. *Question by Complainant.* Were there complaints of Major Capen's unwillingness to pass down the order, without its having passed the hands of the Major General or not?

Answer. There were not.

Question by Col. Davis. Were the company in close or open order when they were ordered to present arms at granite range?

Answer. They were in open order.

The Complainant here rested his case.

Mr Henry W. Sargent was called by Respondent and sworn.

1. *Question by Respondent.* What office did you hold on the last Election day in the company of Cadets?

Answer. Office of Adjutant.

2. *Question by same.* In what manner was the company drawn up on delivering the escort at the meeting-house, and what were its movements immediately subsequent?

Answer. They were in line, with their rear to the church. The right of the company were at or very near the head of Milk Street. The left extended nearly to the door of the church. They stood in open ranks with arms presented. After the procession had passed into the church, the company

carried arms, closed ranks and countermarched — right face — left countermarch, which brought the right of the company a few feet below the door of the church. They then formed column of companies, and commenced marching down the street. Just as the company had commenced marching in column, Col. Quincy passed through the music and first company, and gave me an order for Col. Winthrop, which was for the company to report themselves in more than half an hour, *or* half an hour and more, I don't know which — which order I reported to Col. Winthrop at the first halt, which was opposite or a few feet beyond a narrow passage way at the east end of the church, and nearly opposite Brigham's house.

3. *Question by same.* State the whole conversation, which passed between Col. Quincy and yourself.

Answer. After Col. Quincy had first given me the order, fearing that I did not understand him, I requested him to repeat it, which he did, as nearly as I recollect, as I have before stated it; my impression is he also added, that when we reported ourselves at the end of the half hour, he would either be out himself, or send out and give us further orders, I have no recollection that anything more passed between us.

4. *Question by same.* How did you report the order to Col. Winthrop?

Answer. I reported I think twice; the order and the conversation, once as before stated, at the first halt; the second time, as soon as we arrived at the Exchange, which was the second halt.

5. *Question by same.* After how long a time did the company return to the meeting-house, and what measures were taken to receive an order in the meanwhile?

Answer. As soon as we arrived at the Exchange, the half hour having nearly expired, it being about 20 minutes, I suggested to Col. Winthrop the expediency of sending an officer to the church, to receive the further orders which we expected from Col. Quincy, upon which, Orderly Sergeant Murdock was sent up to the church, with orders to wait till he had received a communication from Col. Quincy. After he had been absent ten or fifteen minutes, fearful from his not returning, that some accident had happened, the company was marched to the church. After arriving there, they were wheeled into line and ordered arms. I then went into the church, with a view of discovering what had become of Murdock, I met him coming out at the inside door of the church. Upon asking the reason

of delay, he said he had received no order from Col. Quincy. He also added that Col. Quincy had evidently seen him. I think his expression was, that he had caught his eye once or twice, but had made no communication to him. He said the sermon had progressed but a little way, and that it was evident, there would be some time before the services would cease, of all which conversation I informed Col. Winthrop.

6. *Question by same.* How long were the company kept there at that time, and why were they marched away?

Answer. I imagine they were kept there 5 or 10 minutes. They were marched away for the purpose of keeping the men from freezing. They then marched down Milk Street, through Federal Street, up Franklin Street, and to the church, an interval of eight minutes, I should think; perhaps not more than five or six: from six to eight minutes. They were again wheeled into line in front of the church, and ordered arms; two members of the company, the same who marched on each side of the governor in coming from the State House, Mr Austin and Mr Tilden, were despatched to the porch and stood on each side of the passage way for the purpose of keeping the way clear from the crowd. Being again told by one of the constables at the door, and by one or two gentlemen whose names I know not, who were coming out of the church, that the services were not nearly through, the company were again marched to the Exchange, the men and the music both complaining very much of the cold by standing still; but before we left the church, strict orders were left with Mr Braman to give us notice the moment the sermon was through. Before the company marched away, and I believe before he gave this order to Mr Braman, Col. Winthrop observed to me, that if he left Mr Braman in the church to give us notice the moment the sermon had concluded, that we should have ample time to return to the church before the service had concluded, he being informed that a long prayer and anthem were to take place after the sermon. This conversation took place, I think, in the porch. The company was again marched to the Exchange. After arriving at the basement-room of the Exchange, strict orders were given not to leave the ranks. No refreshment of any kind was allowed. After a space of four or five minutes, Mr Braman came in and informed us the sermon had just finished, upon which the company were marched, quick time, through Congress Street, up Milk Street. As the head of the company arrived in sight of Washington Street, and nearly opposite

to the hotel in Milk Street, called the Mansion House, I observed the governor and suite just turning the corner of Milk Street into Washington Street. The company marched on at quick time up to Washington Street, and thence to the corner of Bromfield's Lane. After we had progressed a very short distance in Bromfield's Lane, Col. Winthrop changed the order to double quick, myself giving the order to trail arms; after proceeding at double quick time up Bromfield's Lane, the company were halted, nearly opposite the house, where Dr Ingalls did, or now does live, perhaps a little this side of Bumstead Place; part of the company I should think, were nearly opposite the house, whether the first or last part I cannot say. We immediately changed arms from a trail to shoulder, and were marched, I think, quick time, I am sure it was not double quick time, to very near the head of Winter Street, where I think the order was given to *left into line, wheel, rear rank, open order, and present arms*. I think between the order to left into line, wheel, and open ranks, and present arms, his excellency and suite turned the corner of Winter Street, so that by the time his excellency had reached the centre of the company on the side-walk, and certainly before he had reached the left, the company had performed the last order given to present arms. As his excellency was crossing from the side walk in Tremont Street to Park Street corner, two members of the company before mentioned, asked me, if they should go up to him with the intention of walking on each side, in the manner they had come from the State House. I directed them to do so, upon which they both went up, I think just before he reached the corner of Park Street, and while he was still in the street. His excellency and suite not noticing their services, they retired and came back to the company. The company in the meantime had shouldered arms, and closed ranks; and I think by the time the two members before mentioned had arrived at their place, the company were countermarching. After they had countermarched, they formed open column of companies, and marched at common time, it might have been quick, up Park Street to the front of the State House, when they formed line and halted. I was then despatched by Col. Winthrop to the council chamber, to inform his excellency through Col. Quincy, that the Cadets were below and waited for further orders; which I did, and received as an answer from Col. Quincy, that his excellency had no further orders for the Cadets, or words to that import; which message I reported to Col.

Winthrop, upon which the company were marched to the armory at common time and dismissed.

The Court here adjourned to meet again on Tuesday morning next at 11 o'clock.

TUESDAY MORNING, MARCH 20, 1832.

The Court met pursuant to adjournment.

Present. Brig. Gen. Wm. Peck, President. — Col. Thomas Davis ; Col. Charles Lane ; Lieut. Col. Abijah Ellis ; Lieut. Col. Luther Eaton.

The Respondent was called and answered.

The Complainant was called and answered.

The Judge Advocate read the record of Saturday.

Mr Sargent wished to correct his testimony of Saturday, and said that Col. Quincy when he gave him the orders as they were departing from the meeting-house, said that the company should report itself in half an hour and more, or, in half an hour or more, and when you return I will either be out or send out and give you further orders.

Mr Sargent again called.

7. *Question by Respondent.* What degree of pains do you know that I took to procure a suitable escort to come out on Election day ?

Answer. A great deal of pains. I know that you procured two or three volunteers, and by your exertion with other members of the corps, others were procured. You was at great expense in procuring uniforms for the volunteers and paying for them. You procured six uniforms to my knowledge, if not more.

8. *Question by same.* How long did the company remain at the meeting-house, after returning the second time, and why did they go away ?

Answer. I should think from eight to twelve minutes. They went away because there was little probability of the sermon being finished under some time, on account of the extreme cold, and the extreme unwillingness of the company to remain longer ; there was also a funeral in the street, but I cannot swear whether that influenced the mind of the commander. The company's remaining there would have been a disturbance to the funeral. Col. Winthrop told me, at the time, that he had been requested to remove his company. I saw a person speaking to Col. Winthrop about that time, but whether upon the subject of the funeral or not I do not know.

9. *Question by same.* What was the degree of suffering or complaint among the men on account of the cold?

Answer. There appeared to be a good deal of suffering, and there was a great deal of complaint.

10. *Question by same.* Did you receive from his excellency or any of his staff, any orders before taking up the escort at the State House? if so what were they?

Answer. None to my recollection. We had an invitation to a collation.

11. *Question by same.* When you reported to me the orders you received at the meeting-house, was there any doubt or question between us as to the meaning of those orders?

Answer. There was. You asked me, twice I think, 'once certainly, what Col. Quincy meant by more than half an hour, and expressed a great deal of doubt as to the meaning of the order, and as to the time when he intended we should return.

12. *Question by same.* Are the members of the Cadets, men used to great exposure and labor or otherwise?

Answer. I should think they were not men used to much exposure. They are generally professional men or students at some profession.

13. *Question by same.* Did you see his excellency pass from Winter Street to Park Street?

Answer. I did.

14. *Question by same.* Did he notice in any way the salute paid by the company? Please describe the manner in which he passed the company.

Answer. He did not notice the salute in any way. He passed the company without the slightest notice in any way, looking neither to the right nor left, walking fast, quite fast, I should say. He crossed to Park Street as if he knew not that he passed the company.

15. *Question by same.* Was he in a position to see the situation of the company and to observe its salute?

Answer. It would have been impossible for him not to have seen the company.

16. *Question by same.* What was your position at the time of the salute?

Answer. I was on the extreme right of the rear rank.

17. *Question by same.* Were there any stragglers of the company between you and Bumstead Place, at the time the governor passed?

Answer. I should think that certainly there were none.

18. *Question by same.* Did any of the company intercept the governor, or turn him aside from his path?

Answer. I should say none.

19. *Question by same.* Did you hear Col. Quincy's testimony on this part of the transaction? Was the same accurate or not, and in what particulars?

Answer. I heard it, it was not accurate, according to my knowledge of the subject, in respect to the governor's being interrupted by stragglers of the company, and also that these stragglers extended to Bumstead Place. I don't remember his testimony in other particulars. The centre of the street was beaten down, the snow I think was higher near the side-walk than in the centre of the street. The snow was very high behind the company, entirely obstructing all communication with the mall. There was a beaten pathway from the side-walk fronting the last house but one on the north end of the granite range, to Park Street corner.

20. *Question by same.* Is it or not your duty as adjutant to superintend the movement of all parts of the battalion?

Answer. It is.

21. *Question by same.* Did you observe the corps to be in a confused, or scattered condition at the time his excellency passed them in Tremont Street, or otherwise?

Answer. They were not in a scattered condition, according to my recollection.

1. *Question by Complainant.* What is the distance between the door of the church and the lane at the end of it, where you made the first halt?

Answer. I should think twenty or thirty feet.

2. *Question by same.* Into how many companies was your battalion formed, when you marched in column?

Answer. Into four.

3. *Question by same.* What was the space between the companies?

Answer. The wheeling distance, or five or six feet.

4. *Question by same.* When you halted at the end of the church, did you halt in column, or form a line?

Answer. We halted in column.

5. *Question by same.* Were the music at the head of the company?

Answer. They were.

6. *Question by same.* What streets did you march through, when you left the church the first time in going to the Exchange?

Answer. Through Milk Street, Federal Street, Franklin Place, Franklin Street, Washington Street, Sumner Street, High Street, Pearl Street, Milk Street, and Congress Street.

7. *Question by same.* Did you have a collation, or refreshment at the Exchange after you arrived?

Answer. We did.

8. *Question by same.* Did you sit down?

Answer. There were seats provided. I believe a majority sat down.

9. *Question by same.* How long were you partaking of that collation?

Answer. Fifteen or twenty minutes.

10. *Question by same.* At what time did you take up the escort at the State House?

Answer. I do not recollect.

11. *Question by same.* At what time did you deliver it at the church?

Answer. I do not know.

12. *Question by same.* When you went to the Exchange the second time, did all the company remain in the basement room?

Answer. All I believe with the exception of three.

13. *Question by same.* Where did they go?

Answer. They went and warmed their feet at the fire in the room, where we had the collation, which was the room opposite the bar room, fronting on the lane.

14. *Question by same.* Were the musicians with you in the basement room?

Answer. I believe none of the music left the basement room.

15. *Question by same.* How many fire-places or stoves are there in that room?

Answer. There are no fire-places, and but one stove.

16. *Question by same.* Did you see Mr Braman when he arrived, or hear him deliver his message?

Answer. I did not see him when he arrived, nor hear him deliver his message to Col. Winthrop, but I heard him repeat his message to others.

17. *Question by same.* How long was it after you heard this message, before the company were on their march?

Answer. I think, at the time I heard this message, the company were already moving. The right of the company perhaps were out of the house, I heard it on the sidewalk.

18. *Question by same.* When the company turned into Milk Street, were the drums and fifes playing, or the band?

Answer. I believe the drums and fifes.

14. *Question by same.* When did the band begin to play?

Answer. I think the band did not commence playing, until the company were in Park Street, after the governor had passed them. I am very confident that the band did play from about opposite Dr Warren's house to the State House.

20. *Question by same.* How many musicians were out that day?

Answer. From twentyfive to twentyseven in the whole.

21. *Question by same.* What is the distance from the *Mansion House* in Milk Street to Washington Street?

Answer. I cannot form any computation.

22. *Question by same.* When the company turned up Bromfield's Lane, how far ahead was the governor?

Answer. My impression is that he was opposite, perhaps a little beyond Col. Gibbens's store. That store is three doors below Summer Street, two or three doors, perhaps four.

23. *Question by same.* Was there a large or small procession with the governor at that time?

Answer. I believe extremely small.

24. *Question by same.* How many military officers with him?

Answer. I believe but two or three.

25. *Question by same.* How long did the company halt opposite Dr Ingalls's house?

Answer. Hardly one moment.

26. *Question by same.* Had all the members joined you before you moved?

Answer. I believe they all had.

27. *Question by same.* Had all the musicians?

Answer. They all had, I believe.

28. *Question by same.* Who was the last member that came up when you halted at the head of Bumstead Place?

Answer. I believe Mr Perkins, but am not perfectly confident; I refer to the members of the company.

29. *Question by same.* Are you sure that no member of the company, nor any musician joined you after you left Bumstead Place?

Answer. I should be unwilling to take my oath of it, but my impression is very strong, that no one did join us, after leaving Bumstead Place.

30. *Question by same.* When you first met the governor at the head of Winter Street, was he in the middle of the street, or on the sidewalk?

Answer. He was on the sidewalk.

31. *Question by same.* On what part of the sidewalk?

Answer. I think that when he turned the corner he was on the middle of it, between Col. Quincy and the Adjutant General.

32. *Question by same.* Did you see him when he turned the corner?

Answer. My impression is that I did, I certainly did, either as he turned the corner, or a second after, I heard a number of voices crying, there he is, there he is.

33. *Question by same.* Where was the right of the company at the time the order to present arms was given?

Answer. I believe opposite the first door in granite range.

34. *Question by same.* Was the music on the right of the company?

Answer. It was.

35. *Question by same.* Was the company in double rank?

Answer. They were.

36. *Question by same.* When the order was given to present arms, did the officers take their proper positions, in front of the line?

Answer. I do not recollect, my impression is they were in front. There is no change in the position of the officers, at that command.

37. *Question by same.* Did they advance to their positions in front at the order, *open ranks*?

Answer. I believe that they did, but am not perfectly confident.

38. *Question by same.* What position did Col. Winthrop take at that order?

Answer. I have no recollection.

39. *Question by same.* What was your own position?

Answer. My own was my usual position, when the company is in line, on the extreme right.

40. *Question by same.* Did the standard salute?

Answer. I believe the standard was not out.

41. *Question by same.* How far did the musicians extend beyond the right of the company when you formed the line at the head of Winter Street?

Answer. Nearly opposite the corner of Winter Street, four or five feet beyond the company.

42. *Question by same.* Did the band play a march, or the drums ruffle?

Answer. I have no recollection of anything of the kind.

43. *Question by same.* What were the places of Tilden and Austin in the company?

Answer. They were in the rear rank first company, I think Austin at the right hand and Tilden next to him.

44. *Question by same.* When you marched up Park Street, did you see the governor before you?

Answer. I did, all the way up the street.

45. *Question by same.* Who was with him?

Answer. Same, as when he turned the corner of the street. The Adjutant General, Col. Quincy, and I believe Mr Sheriff Sumner and one or two more.

46. *Question by same.* Was the Adjutant General and Col. Quincy by the side of the governor when the salute was ordered?

Answer. My impression is that they were by the side of him. They might have been a little behind him.

47. *Question by same.* Did they continue with him from the side walk of granite range up to the State House?

Answer. I believe that they did.

48. *Question by same.* Was there a crowd between the company and the governor when they presented arms in front of granite range?

Answer. There was not a crowd, there might have been a few scattering people.

49. *Question by same.* Was there noise and confusion?

Answer. A little, I should not say much.

The court adjourned to meet at half past 3 o'clock this afternoon.

TUESDAY AFTERNOON, MARCH 20, 1832.

The court met pursuant to adjournment.

Present. Brig. Gen. William Peck, President. — Col. Thomas Davis; Col. Charles Lane; Lieut. Col. Abijah Ellis; Lieut. Col. Luther Eaton.

The Respondent was called and answered.

The Complainant was called and answered.

Capt. Sargent was again called.

50. *Question by Complainant.* When did Tilden and Austin first attempt to take their position at the side of the governor?

Answer. I think it was while he was crossing Tremont Street, and just before he arrived at Park Street corner.

51. *Question by same.* Which way did the company move on account of the funeral in Milk Street?

Answer. Down Milk Street, on the left side of the way.

52. *Question by same.* Which way was the funeral proceeding?

Answer. It was headed up Milk Street towards Washington Street.

53. *Question by same.* What would be the length of your company from the extreme right of the music, to the extreme left of the company when formed in line?

Answer. Thirtyfive or forty feet.

54. *Question by same.* How many men had you to a company that day?

Answer. I believe there were five men in the front rank and four in the rear, making nine men in a company.

22. *Question by Respondent.* Who were the three who went to the fire in another room at the Exchange?

Answer. I don't recollect.

23. *Question by same.* How many of the company did you observe to lose their place in going up Bromfield's lane?

Answer. I cannot say, except Mr Perkins.

24. *Question by same.* What was the object of the halt, at the head of Bromfield's lane?

Answer. To reduce the men into more order, than they could be in after moving so quick, to change the time from double quick, and the arms from a trail to a shoulder.

Question by Col. Lane. Were the members of the company, men of delicate or hardy habits?

Answer. Rather delicate than hardy. Men who had been in the habit of wearing overcoats or some outer garment all winter and who left them off that day.

Question by Col. Ellis. Did you see the governor pass round the left of the company in Tremont Street?

Answer. I did considerably to the left.

Question by Judge Advocate. Can you say how much?

Answer. My impression is five or eight feet, perhaps more.

55. *Question by Complainant.* Did you complain of the cold yourself to Col. Winthrop?

Answer. Only when standing still before the church. But I was not so liable to it as others for I carried no gun.

Mr Theodore O. Thacher was called by Respondent and sworn.

1. *Question by Respondent.* What was your office and position in the Cadets on Election day, and what were their material movements?

Answer. I hold the office of fourth sergeant, and had com-

mand of the third company from the right. The escort was delivered at the church as has been stated. After the company had countermarched and brought the head of it down Milk Street, an order was given to halt. I saw Col. Quincy come out of the church, I presume to deliver the usual order. The company marched to the Exchange, where they remained, I should think about fifteen minutes. They then returned to the church, formed in front of it, and remained long enough to excite a good deal of complaint among those members of the company who were around me and whom I was able to hear and see at the time, on account of the severity of the weather. Several of the company said they could not remain, though they were perfectly willing to march about the streets. After remaining there fifteen minutes, if not quite, they were marched round several of the streets and we returned to the church again, where they remained I should think, as long as they did the first time. They were then marched the shortest route back to the Exchange, into the basement room, where they formed as well as they could, and stood at ease. The order was given that each man should remain in his place. I went up stairs into a room, where we had had a collation, and there were one or two of the company there. I remained about, or nearly five minutes, when a man ran up and said that the Cadets had left the house and returned to the church. I immediately ran down and saw the head of the company, but not the music, turning into Congress Street. I ran to my place and marched to Milk Street. After turning into Milk Street, I saw what I took to be a part of the procession, at or near the door of the church. They seemed to me to be leaving the church. I saw what I took to be the uniform of the military officers in the procession. As we went up Milk Street, I saw these same members of the procession turn into Washington Street. I did not see them again till we got into Tremont Street. When the company arrived at Bromfield's Lane, I heard the order given by Col. Winthrop, double quick step, and immediately I heard the drum tap, I repeated the order to my company — when in Bromfield's Lane I looked round and saw a portion of my company with arms trailed and some with arms shouldered, I then gave the order to trail arms, not having heard it myself. When the whole company wheeled into Tremont Street, it was halted, the arms were changed to a shoulder and we marched quick time, till as I supposed the right of the company had got at or near Winter Street, I was

near the extreme left. The order was given to wheel into line. I then saw the governor and his suite at the corner of Winter Street, on the side-walk. We were at open order, I heard the order given, *present arms*. I saw two members of the company go forward from the right of the company, but I don't know what became of them. I saw the governor and his suite as they were about crossing over Park Street. There was a crowd round them. The next time I saw them, they were in Park Street, on the side-walk. I did not see them approach the left of the company. Had the left of the company interfered with them as they crossed over, I should have seen it, because my position was near the left. I heard the order given, *shoulder arms, close order, right face, left countermarch*. At the bottom of Park Street the company broke into column and marched up quick time, and formed in line, in front of the State House.

2. *Question by same.* How long after leaving the church the last time, was it before the company began to move from the Exchange?

Answer. I should think, between ten and fifteen minutes.

3. *Question by same.* What officer in the Cadets usually orders changes of arms on the march; and do the commanders of sections usually repeat the order?

Answer. The adjutant on the march usually gives the orders for a change of arms—it is usual for the commanders of sections to repeat the order.

4. *Question by same.* Did any of your company fall in the rear in Bromfield's Lane? If yea, who?

Answer. None.

5. *Question by same.* Can you name the men who composed your section, and whether they were in their places in line, when the governor appeared at the head of Winter Street?

Answer. I can name them. Had they not been in their places at the time mentioned I should have known it. They were in line. They were Mr Andrews, Mr Charles T. Murdock, Sullivan Warren, Daniel F. Webster, who were in the front rank. Richard M. Chapman, William Elliot and Francis H. Gray composed the rear rank.

6. *Question by same.* Did you see any of the men of the whole company out of their places at the head of Winter Street?

Answer. I did not, with the exception of the two men whom I before mentioned going from the right towards the governor.

7. *Question by same.* Can you name the persons, who composed the fourth company?

Answer. I cannot name all of them. I know Sergeant Warren who commanded it, and I remember two privates in the rear rank, Messrs Perkins and Adams, Mr Bryant was corporal. Mr Bryant has gone to New Orleans, Perkins to the South.

8. *Question by same.* Did you see the governor pass round the left flank of the company?

Answer. I did not.

9. *Question by same.* Was there or not considerable snow in Tremont Street?

Answer. There was, the company stood in the path or road, it was in the middle of the street in the carriage path, but there was snow so as to make it uncomfortable standing.

10. *Question by same.* Do you know what degree of pains and expense the Respondent was at to procure an escort for that day?

Answer. I know that he was at great pains and at great expense, it was by his efforts alone, that the company were able to bring out a sufficient number to make a respectable appearance. All the members of the company who were in Boston at that time, who were not prevented by sickness or the fear of exposure, did duty that day. It was necessary to obtain a sufficient number of volunteers to supply the places of the absent, and he provided uniforms for eight or ten, who appeared in those uniforms.

1. *Question by Complainant.* Were those volunteers, members of any other military company in this town?

Answer. None of them were to my knowledge.

2. *Question by same.* To what company did they belong?

Answer. Some of them were attached to the college company, I do not know how many.

3. *Question by same.* To what company did the rest belong?

Answer. I do not know that they belonged to any, some of the volunteers were, or had been attached to the Cadet company.

4. *Question by same.* What members of the company made complaint of the cold?

Answer. I do not remember particularly who made the complaints. I do remember that Mr Adams made complaint, I heard him say, this is what kills me; I am willing to march about as much as the colonel pleases, but I can't stand here.

5. *Question by same.* Are you positive that, when coming up Milk Street, you saw any of the officers in uniform?

Answer. I did not say that I was positive; I said, I thought I saw some members of the procession at or near the door of the church.

6. *Question by same.* Were the members of the procession whom you saw turn into Washington Street, any of them in uniform?

Answer. By seeing what I took to be officers in uniform, I supposed it was members of the procession.

7. *Question by same.* Was there a crowd around the company, or between the company and the governor in Tremont Street opposite granite range?

Answer. There was. Whether it came with the company or with the procession, I cannot say, but it appeared to me to come with both. It interrupted my view of the governor.

Mr Joseph Murdock was called by Respondent and sworn.

1. *Question by Respondent.* What office do you hold, and what command had you in the Cadets on Election day?

Answer. The office of first sergeant, and I commanded the first company.

2. *Question by same.* Were you sent to the meeting-house on that day? *If yea*, for what purpose, and how long did you remain there?

Answer. I was ordered by Capt. Sargent to go to the church and await Col. Quincy's orders. I remained there fifteen or twenty minutes.

3. *Question by same.* Did Col. Quincy know of your presence, and did you receive any communication from him?

Answer. I am not certain that he knew of my presence, I think I caught his eye several times while I remained there. I sat at the side of the church near the door. Col. Quincy was on the opposite side near the pulpit; I made no signal; I thought as I had caught his eye that nothing else was necessary.

4. *Question by same.* Why and when did you leave the church?

Answer. Because the company came up in about fifteen minutes. I heard their music, and looking out of the window I saw them. The music was loud enough to be distinctly heard throughout the meeting-house.

5. *Question by same.* How long did the company remain, and was there or not, much suffering from the cold at that time?

Answer. I should think they remained between ten and

fifteen minutes. I heard a good many complaints about me in the first company and felt it very severely myself.

6. *Question by same.* How long did you remain there after your second return?

Answer. I should think about as long as the first time.

7. *Question by same.* By what order did you move through Bromfield's Lane, and did any of your company fall in the rear?

Answer. We moved at double quick time. None of my company fell in the rear to my knowledge, I turned several times to see.

8. *Question by same.* Were the men of your company in their place in line, when the governor entered Tremont Street?

Answer. They were.

9. *Question by same.* Were they at opened or closed ranks?

Answer. Open ranks.

10. *Question by same.* Did they or not, present arms, when his excellency appeared?

Answer. They did present arms.

11. *Question by same.* Were these several movements made by regular order or not?

Answer. They were made by regular order.

12. *Question by same.* Did you see the escort of the 22d of February, when they were dismissed near the Tremont house, and how did they move off?

This question was withdrawn, it being admitted, that an order to move in double quick time, is a military order.

Here the court adjourned to meet tomorrow morning at half past 9 o'clock.

WEDNESDAY MORNING, MARCH 21, 1832.

The court met pursuant to adjournment.

Present. Brig. Gen. Wm. Peck, President. — Col. Thomas Davis; Col. Charles Lane; Lieut. Col. Abijah Ellis; Lieut. Col. Luther Eaton.

The Respondent was called and answered.

The Complainant was called and answered.

The Judge Advocate read the record of yesterday.

Mr Thacher wished to correct his testimony of yesterday by saying that he knew that Col. Winthrop provided "coats" for eight or ten persons instead of "uniforms."

Mr Murdock was again called.

1. *Question by Complainant.* Did you join the company when they came up to the church the first time from the Exchange?

Answer. I did.

2. *Question by same.* Did you continue with them afterwards through the day?

Answer. I did.

3. *Question by same.* What officers of the governor's staff were with him when he crossed Tremont Street?

Answer. I only remember the Adjutant General, and Col. Quincy.

4. *Question by same.* Did they walk by the governor's side?

Answer. I think they were a little in the rear.

5. *Question by same.* Did they walk together?

Answer. I cannot say positively.

6. *Question by same.* Do you know where the governor was when you presented arms?

Answer. I think he was nearly opposite the extreme right of the music.

7. *Question by same.* Where was that?

Answer. Opposite the corner of the first house in granite range.

8. *Question by same.* Can you state positively, that it did not extend beyond the corner?

Answer. I cannot state positively, but it is my impression, that it did not.

9. *Question by same.* Was the order to present arms given in so audible a voice that the governor must have heard it?

Answer. I think it was, as he was nearer to Col. Winthrop than I was, and I heard it.

Question by Col. Ellis. How near the side-walk was the company when in line in Tremont Street?

Answer. Nearly the opposite side of the street towards the mall, I think there was a bank of snow between them and the rail of the common, which prevented their forming nearer.

10. *Question by Complainant.* Was there a bank of snow between the company and the side-walk of granite range?

Answer. I think there was, near the side-walk.

Question by Judge Advocate. When the company returned to the meeting-house the first time, how long did you remain at your post, in the church after hearing their music and seeing them, as you before stated?

Answer. I went directly out as soon as I saw them.

Question by same. Did you return to your post again in the church?

Answer. I did not.

13. *Question by Respondent.* Why did you not return?

Answer. I was not ordered to.

Question by Col. Davis. Were the company when passing up Bromfield's lane in close or open order?

Answer. In open order.

Question by Col. Lane. Was the left of the company after arriving in Tremont Street, in a scattered condition, before they halted to form line?

Answer. I did not observe them.

Question by Col. Davis. Did the company act as Infantry or Light Infantry that day?

Answer. I cannot answer that question.

Question by same. Were they at fixed bayonets or unfixed, when passing up Bromfield's lane?

Answer. I think they were fixed.

Mr Joseph T. Adams, called and sworn.

1. *Question by Respondent.* Were you out with the Cadets on the 4th January last? If yea, what place did you occupy?

Answer. I was out on that occasion and occupied the right flank of the fourth company. I believe I was in the front rank.

2. *Question by same.* Who commanded that station?

Answer. I believe Sergeant Warren.

3. *Question by same.* Were you in line or not, and did you not present arms to the governor in Tremont Street?

Answer. I believe I did, I recollect that I was in line and we presented arms.

4. *Question by same.* Were or were not your company in line also?

Answer. I should think they were, I did not observe any deficiency in number.

5. *Question by same.* Did any, and if any, how many of your company fall in the rear in passing up Bromfield's Lane?

Answer. In one part of the lane, I was two or three paces in the rear myself, in consequence of having slipt, I observed one other a considerable distance in the rear, it was Mr Perkins. I recovered my place in the company before I got to the head of the lane.

6. *Question by same.* Did you or not see any other of the whole company in the rear?

Answer. None to my recollection.

7. *Question by same.* Did you or not suffer much from exposure to the cold on that day, while under arms?

Answer. I suffered very much while standing, particularly where there was snow, but none at all while on the march.

1. *Question by Complainant.* Did you not prepare yourself to withstand the cold on that day by extra garments?

Answer. I prepared myself thoroughly, with the exception of my feet, I had no overshoes on.

2. *Question by same.* Who gave the order to present arms in Tremont Street?

Answer. I don't recollect.

3. *Question by same.* What order was given previous to that?

Answer. I cannot undertake to say, I remember that some order was given, which we conformed to when we came into line.

4. *Question by same.* Were your ranks closed, when you were formed in line?

Answer. According to the best of my recollection they were.

5. *Question by same.* What was your first change of position from closed ranks?

Answer. I have no recollection.

6. *Question by same.* Where was the governor when you presented arms?

Answer. In front of granite range; my impression is that he was against the third building from the corner, though I cannot say with certainty.

7. *Question by same.* Was the noise and confusion such that you could not hear the orders with precision?

Answer. I am not aware that there was any noise, which would have prevented me from hearing, I am not aware of any noise or confusion sufficient to interfere with the movements of the company.

8. *Question by same.* Did you not hear a shouting among the multitude?

Answer. I heard some shouting, but not more than is usual when companies turn the corner of a street, perhaps not so much in consequence of there not being so many people there.

9. *Question by same.* Was Mr Perkins in the company when you presented arms?

Answer. I don't recollect observing his absence or his presence.

10. *Question by same.* Was Mr Perkins' position in the front or rear rank of your company?

Answer. My impression is it was in the front rank, though I am not certain.

11. *Question by same.* When you came by the church, and before you entered Bromfield's lane, did you move faster than a walk?

Answer. I don't remember distinctly at what point we got out of a walk.

12. *Question by same.* At what pace did you go up Bromfield's Lane?

Answer. At double quick time.

13. *Question by same.* Did you walk or run?

Answer. We ran.

14. *Question by same.* Did you run as fast as you could?

Answer. I run as fast as I could, after I fell in the rear, but not as fast as I could when with my company.

15. *Question by same.* Where was it that you slipped?

Answer. Toward the lower part of the street, not far from the middle.

16. *Question by same.* Were all the company and musicians ahead of you except Mr Perkins.

Answer. I do not now recollect of seeing any other in the rear of me except Mr Perkins.

17. *Question by same.* Were all the members of the company in their places as they ran through the lane?

Answer. They were not.

18. *Question by same.* Where were those who were not in their places?

Answer. Mr Perkins was in the rear most of the time, I was a part of the time and farther I know not.

19. *Question by same.* Where did Mr Perkins join the company?

Answer. I know not.

20. *Question by same.* Did your company halt in front of the church the last time, before they passed it?

Answer. If I remember correctly, they did not.

21. *Question by same.* When you were formed in line in Tremont Street, did the left of the company extend beyond the flagging stones at the crossing?

Answer. No. I should say it did not approach it by half the length of the company.

8. *Question by Respondent.* Do you know what members composed the fourth company?

Answer. Mr Perkins, Stetson, Corporal Bryant, I recollect no others. My recollection of the details of the operations of the company on that day are very imperfect, in consequence of my not having attended to the subject from that day to this, and because I have been much occupied about other matters.

Major Henderson Inches, Jr, was called and sworn.

1. *Question by Respondent.* What office do you hold in the Cadets?

Answer. That of first Lieutenant, with the rank of Major.

2. *Question by same.* Do you know any fact bearing upon the charge of disrespect towards the governor by myself?

Answer. Great exertions were made by you to get out a large number of men, considerable expense was incurred in providing uniforms as an inducement to individuals to come out. I am not aware of anything omitted. On the governor's descent from the State House to the gate, the company presenting arms, you turned to me and ordered me to direct the band to play until the governor replaced his hat, observing that he was entitled to a full march. Your efforts to overtake the governor, I supposed to be to repair the omission or neglect, and not from any motives of disrespect.

3. *Question by same.* From any conversations held by you with me that day, or acts done, did you infer any disrespect on my part towards the governor?

Answer. Not the slightest.

4. *Question by same.* What pains were taken to your knowledge to insure a punctual attendance at the meeting-house, at the close of the services?

Answer. As I heard no order given I cannot state.

5. *Question by same.* Were the company in military order or in a scattered condition in Tremont Street?

Answer. The right wing of which I had the command were in military order, I do not mean by this, that the left wing was otherwise.

6. *Question by same.* Were you at opened or closed ranks, when his excellency appeared, and did the company or not present arms?

Answer. As soon as I saw his excellency, open order was taken by the soldiers under my command, and arms presented.

7. *Question by same.* What notice was taken of the salute?

Answer. None that I saw except avoiding the company.

8. *Question by same.* Did you see his excellency cross Tremont Street? If yea, did any of the corps intercept him?

Answer. In consequence of the density of the crowd, I don't recollect positively to have seen his excellency and suite, until they were stepping up on to the side-walk at Park Street corner, when I saw the Adjutant General. When I saw the Adjutant General step up as I stated on to the side-walk by Park Street church, the company had commenced counter-marching. How far the governor went to the left of the company, I cannot tell.

9. *Question by same.* Did the left extend beyond the usual crossing place?

Answer. I should not think it possible that it could.

10. *Question by same.* How long did you remain in front of the Old South on your first return, and why did you remove?

Answer. We remained, I should think, five or ten minutes, perhaps ten. We removed because some one from the interior of the church informed us, that the sermon was not probably half completed, and because of the extreme severity of the weather.

11. *Question by same.* How long did you remain in front, on your second return to the church?

Answer. Longer than the first time. Guards were posted at the door, and I have a strong impression that the company took open order. Some one at the church door, observed upon the extreme severity of the weather, and that the sermon would not be completed for a long time. He said it was impossible for the company to remain there, and observed, we had better go to some shelter, leaving a person to give us notice when the services were drawing to a close.

12. *Question by same.* Would it in your opinion, as an officer, have been safe and prudent to have kept men drawn up under arms, on that day, longer at any one time, than I did?

Answer. I don't know that five minutes more, or ten minutes more would have frozen them, but I should not think it was prudent to have kept them longer. I have seen regulars in different countries, with additional clothing, in much less severe weather.

13. *Question by same.* Did you take any cold yourself?

Answer. I did not, I took the precaution of putting on additional clothing, and am not accustomed to wearing overshoes.

The court adjourned to meet at half past one o'clock.

The court met pursuant to adjournment.

Present. Brig. Gen. Wm. Peck, President. — Col. Thomas Davis ; Col. Charles Lane ; Lieut. Col. Abijah Ellis ; Lieut. Col. Luther Eaton.

The Respondent was called and answered.

The Complainant was called and answered.

Major Inches was again called.

1. *Question by Complainant.* Did you and Col. Winthrop call at my house on the Sunday previous to the Election day, to confer with me on the subject of the parade ?

Answer. We did.

2. *Question by same.* Did Col. Winthrop make any complaint to me at that time that he had not received his orders for parade ?

Answer. I do not recollect that he did.

3. *Question by same.* Were the arrangements which he proposed complied with on my part ?

Answer. I believe they were, I recollect no arrangement except with respect to the collation, and that was complied with.

4. *Question by same.* Did you see the governor from the time he passed the corner of Winter Street, until after he arrived at Park Street corner ?

Answer. I think I saw him for a few paces, after he passed the corner of Winter Street, but not again until he reached Park Street corner, I think I did not see him step upon the side-walk, but I saw him going up Park Street.

5. *Question by same.* Did you see where Tilden and Austin first presented themselves at his side ?

Answer. I did not.

Question by Col. Ellis. Do you know what part of the company the governor was opposite when they presented arms in Tremont Street ?

Answer. I cannot say.

Question by same. How did the governor avoid the company ?

Answer. By passing rapidly along upon the side-walk with a portion of the crowd between him and the company ; and I did not see him acknowledge the salute by raising his hand to his hat, which I believe is customary.

Question by Col. Davis. How do you know the governor passed rapidly by the company, if you did not see him only immediately after he turned the corner ?

Answer. While I did see him he passed rapidly. After that I saw the Adjutant General moving a quick step, and if his

excellency was near him, he must have moved in the same manner.

Question by same. Was there a great crowd between the company and the governor at the time he passed?

Answer. There was at the time he passed me.

6. *Question by Complainant.* Was Col. Quincy with him at the time you saw him?

Answer. I cannot state positively, his dress being dark, and I being near sighted, I could not distinguish.

14. *Question by Respondent.* If you could not distinguish Col. Quincy, how were you enabled to distinguish the Adjutant General?

Answer. Col. Quincy's dress is of a dark color, and his feathers also. The Adjutant General's feathers are white, and his dress is more highly ornamented?

15. *Question by same.* In the conversation with the Adjutant General on Sunday, was anything said of the company's going to the Exchange?

Answer. I think there was. It was stated as a reason why the collation at the State House need not be so extensive as formerly.

16. *Question by same.* Where was your position when the governor entered Tremont Street, and did you or did you not see him up to the time of his passing you?

Answer. My position was in front of the centre of the right ring. I do not mean to say that I saw his excellency all the time until he passed me.

17. *Question by same.* Did you see him at the time of his passing you?

Answer. I saw him *about* the time, but I can't say as it was when he was exactly opposite me.

Question by Judge Advocate. Can you say that you saw him at the time the order was given to present arms?

Answer. I don't know that I can, nor can I say *by whom* that order was given.

18. *Question by same.* How long was it after you left the Old South church the last time, before you passed by it in your march to take up the escort?

Answer. I should think it could not have exceeded ten or twelve minutes.

Mr Moses Mann was called by Respondent and sworn.

1. *Question by Respondent.* Do you belong to the Boston band, and were you out with the Cadets on the 4th January last?

Answer. I do, and was out on that day, but not on duty, I went with the band, but did not play.

2. *Question by same.* Was it difficult for the band to play on account of the inclemency of the weather?

Answer. It was. The instruments froze on that day, so that it was almost impossible to play, the trombones froze so that we could not slide them, and they had to be thawed out at every place we stopped. The trumpet froze so we were obliged to send for another. Some of the keys of the clarionets froze so that the leathers were pulled off—one clarionet was so frozen that it was checked or split.

3. *Question by same.* Do you know whether any members of the band complained of the cold to Col. Winthrop and urged him to remove from the meeting-house?

Answer. I heard no one complain to Col. Winthrop, though I heard much complaint.

4. *Question by same.* At the time the company last removed from the meeting-house, could the band, without thawing their instruments, have suitably played a march?

Answer. They could not, unless it was played with the serpent, the bass horn, the bass drum and cymbals.

5. *Question by same.* Did you remain behind at the meeting-house and carry a notice to the company? If yea, state the circumstances.

Answer. After the company first returned to the meeting-house, I thought I would remain there to give them notice. When the sermon was drawing to a close I went down to give them notice, and found that Mr Braman had already done it.

6. *Question by same.* How long was it from the time you left the meeting-house until the company passed it?

Answer. I returned immediately and I should think it was about three minutes,* as I have been the ground over since, and it took me just three minutes, I ran both ways.

The court adjourned to meet tomorrow morning at half past 9 o'clock.

THURSDAY, MARCH 22, 1832.

The Court met pursuant to adjournment.

Present. Brig. Gen. William Peck, President.—Col. Thomas Davis; Col. Charles Lane; Lieut. Col. Abijah Ellis; Lieut. Col. Luther Eaton.

The Respondent was called and answered.

The Complainant was called and answered.

The Judge Advocate read the record of yesterday.

Mr Joseph T. Adams, wished to correct his testimony of yesterday by saying that he was in the "rear rank" instead of the "front rank" of his company.

Major Inches, wished to correct his testimony of yesterday, by saying that one reason why he did not see the governor all the time as he was approaching the company from the head of Winter Street, was that he was personally engaged in superintending the formation of the company, and that he stood nearly facing the company, and occasionally looked round over his shoulder towards the governor.

Mr Moses Mann was again called.

7. *Question by Respondent.* Did it take you three minutes to go and return, or three minutes each way, when you went from the meeting-house to the Exchange?

Answer. It took me three minutes to go to the Exchange and back again, I ran both ways on Election day. It might have taken me a little longer on Election day, because as I was returning I met two young men going down and I stopped to tell them that the Cadets were on the march when I got to the Exchange.

8. *Question by same.* Was the sermon actually finished when you left the church?

Answer. It was very near. I think I heard the organ play as I was going down street.

9. *Question by same.* Were the services entirely closed, when you returned to the meeting-house? State what you found there on your return.

Answer. They were closed; as I came within about a rod or two of the meeting-house, the governor came to the door. He looked up and down street, and not seeing the Cadets, started in an instant.

10. *Question by same.* Did he walk off fast or slow?

Answer. Very fast.

11. *Question by same.* Was there at that time any indication of the approach of the company?

Answer. There was, I distinctly heard the drums tapping. The company came so fast that they could not beat regular time.

12. *Question by same.* How long after his excellency left the door, was it, before the company arrived?

Answer. I should not think it was a minute.

13. *Question by same.* How far was his excellency from

the corner of Milk Street when the company came against the meeting-house?

Answer. I should think fifteen or twenty rods, I should not think it was twenty. It appeared to me he was about opposite Mr Parker's library. I was standing at this time, at the corner of the Old South, by Washington Street.

14. *Question by same.* Did you see the Cadets in Tremont Street? If yea, describe all you saw respecting them.

Answer. I did not see the Cadets pass through Bromfield's Lane, they were at the upper end of the lane, when I entered it. When I got into Tremont Street they appeared to be near the head of Winter Street. Being out of breath from the run I had, I walked along leisurely, and when I got opposite Park Street church, they had countermarched and were going up Park Street.

15. *Question by same.* In what position were they when you first saw them?

Answer. I can't describe particularly. There was a crowd, and I was some distance from them.

1. *Question by Complainant.* Did you follow the Cadets after they passed the church to Bromfield's Lane?

Answer. I did as soon as they passed, but did not go as fast as they did.

2. *Question by same.* What streets did you go through on Election day from the church to the Exchange to notify the Cadets?

Answer. I passed down Milk Street into Devonshire Street.

3. *Question by same.* Did you go into the Exchange?

Answer. I did.

4. *Question by same.* Where were the Cadets when you arrived?

Answer. They were in Congress Street and on the march.

5. *Question by same.* Did you follow them through Congress Street on your return?

Answer. I did not, I returned through Devonshire Street

6. *Question by same.* Did you see any of the Cadets?

Answer. None at all, until they came near the meeting-house.

7. *Question by same.* Where were they when you came out of Devonshire Street into Milk Street?

Answer. I think they must have been in Milk Street, judging from the tap of the drum; but I did not see them, I did not look to see them,

8. *Question by same.* Where was you when the governor came out of the door of the church?

Answer. A rod or two below the meeting-house door.

9. *Question by same.* Was there a crowd about there?

Answer. There was something of a crowd.

10. *Question by same.* Where was the governor when you turned up Bromfield's Lane?

Answer. I don't recollect seeing him.

11. *Question by same.* How many instruments were there in the band that day, and what were they?

Answer. There were five clarionets, one octave flute, two French horns, one Kent bugle, one trumpet, three trombones, one bass horn, one serpent, a bass drum, and the cymbals. I do not think I have mentioned all; there were eighteen in the band that day.

12. *Question by same.* Did you walk in the band?

Answer. When the company came from the church to the Exchange the first time, I left them and went into the church, I did not join them again, until they got up to the State House: I did not walk in the band, but kept alongside of them.

13. *Question by same.* Was you with the band at the State House, when they first took up the escort?

Answer. I was close to them.

14. *Question by same.* How long was it after the band came out of the State House, before they saluted the governor?

Answer. I can't state distinctly the length of time, perhaps seven or eight minutes.

15. *Question by same.* When did the instruments first freeze up?

Answer. Some of them froze in going up to the State House the first time, the valve trombone and the valve trumpet, I think it was. I think it was there that we had to change the trumpet. Some of the other instruments were frozen when we went to the Exchange the first time. When we stopped playing, the keys of the clarionets would freeze down.

16. *Question by same.* Did the band play as they approached the Exchange the first time?

Answer. I believe they tried to play as the company went in.

17. *Question by same.* Did the band play all the way from the State House, until they got to the Exchange?

Answer. The band played until they got almost to the Old South, there was then a short stop; as the governor and procession passed they played again. They afterwards commenced

playing in Federal Street, played up Franklin Street, through Washington Street, and part way down Summer Street, when the drums and fifes played, and I don't remember that the band played again until they came to the Exchange.

18. *Question by same.* Have you not known the keyed instruments freeze up in much less severe weather than that on Election day?

Answer. I have known them to freeze up on serenades in the winter time and at funerals; I don't recollect but one funeral; whether the weather was more or less severe I cannot tell; I should think less severe.

19. *Question by same.* Do you know whether all the clarinets were frozen up so as to become useless?

Answer. I don't know.

Question by Judge Advocate. What position did you occupy in the church while you were there?

Answer. I think I took the second pew to the right hand from the door.

Question by same. Did you remain there until you went to the Exchange to notify the company?

Answer. I did all the time.

Mr George Robinson was called by Respondent and sworn.

1. *Question by Respondent.* Was you at the Old South last Election day? If so in what capacity?

Answer. I was there as a constable, I was appointed to attend the procession.

2. *Question by same.* Were you in the church when the services were drawing to a close, and for what purpose did you leave it?

Answer. I was. I left the church when Mr Dean was just about closing his sermon. A few minutes before he closed the sermon, I requested Mr Braman to go immediately for the Cadets. He started immediately, and I followed him to the door. Directly after, Mr Braman started upon the run, I passed inside the porch but not into the meeting-house, and the organ began to play immediately. Mr Quincy made his appearance at the door, and inquired for the company. I told him I had despatched a messenger for the company, and in all probability, they would be there in a few minutes. Col. Quincy stood there a short time, I should say not more than a minute or two. He stood there long enough to ask where the company was, I told him I presumed they were on the march or at the Exchange, observing to him that the company had been at the meeting-house

and staid some time. I further told Col. Quincy that I despatched a messenger to notify the company, as soon as I observed that the sermon was about closing, and that they would probably be back in a few minutes. When the company were at the meeting-house the last time, an officer of the company, I don't know who, asked me how much longer it would be, before the sermon would close, and I told him it was impossible for me to tell, as I observed to him, that I thought they might be absent with safety fifteen minutes, and if the time was short of that, there was a messenger at hand ready to give them notice.

3. *Question by same.* What services were performed after the sermon? and are there usually any on such occasions?

Answer. I don't know that any services were performed after the sermon, as I was not in the house. I was surprised to find that the services were closed; my impression is, that there usually is a short prayer and singing on such occasions.

4. *Question by same.* Did you know where the company had gone?

Answer. I did not.

5. *Question by same.* Did you walk with the governor from the church door? If so, at what pace did he walk?

Answer. I did, he walked pretty quick. It was rather quicker time than that in which we marched to the meeting-house.

6. *Question by same.* Did you find it difficult to keep up with him?

Answer. No, I can't say I found it difficult. It was my business to keep up with him, and if he had walked faster I should have kept up with him.

1. *Question by Complainant.* Do you know whether the officer to whom you said that the services would not probably close under fifteen minutes, related that conversation to Col. Winthrop?

Answer. I do not.

2. *Question by same.* What did Col. Quincy say, when you told him that you had despatched a messenger for the company?

Answer. I don't recollect that he said anything.

3. *Question by same.* Where did you tell Mr Braman to go, when you sent him for the company?

Answer. I told him to run as fast as he could for the company, but I did not tell him where to go, he knew his business, I supposed.

4. *Question by same.* Where was Col. Quincy at the time you had this conversation with him?

Answer. I think he was standing on the lower step of the porch door.

5. *Question by same.* Were there many people about there?

Answer. Very few.

6. *Question by same.* Are you sure that Col. Quincy heard what you said?

Answer. I am not, he made no reply.

Mr Elbridge Gerry Austin called by Respondent and sworn.

1. *Question by Respondent.* Are you a member of the Cadets? What place did you occupy on Election day, and what duty were you detailed to perform?

Answer. I am a member of the Cadets. I was on the extreme right of the rear rank of the first section, and in the escort from the State House to the church, I marched on the left of his excellency and suite to keep off the crowd.

2. *Question by same.* Were you directed to take a similar place at the head of Winter Street? If yea, state what you did.

Answer. After the company were in line at the head of Winter Street I asked Captain Sargent if we (meaning Tilden and myself) should resume our places. He replied "yes". I then stepped from the rear rank, passed between the music and the front rank, in front of the company and by the side of the governor. The governor was moving very rapidly, a great many people were around him, the boys and crowd. He stepped on to the side-walk from the middle of the street, and Col. Quincy passed at that time between me and the governor, and I followed till I got to the vestry door of Park Street church; I there stopt, as I found that the governor did not intend to receive the escort and had continued his pace up the side-walk, moving rapidly. I then returned to the company, which in the meantime had countermarched so as to face up Park Street with the right of the company."

3. *Question by same.* When you passed round the left wing of the company to join the governor, was the same in military order or in a scattered condition; and were any members of the company straggling up from Bumstead Place, as testified by Col. Quincy?

Answer. The company appeared to me to be in line, in perfect military order, I don't know that I saw any members out of their place.

4. *Question by same.* How did you present yourself to the notice of the governor and how did he indicate to you that he did not accept your escort?

Answer. I came directly from the rear rank of the company and marched straight to the governor, but he moved so rapidly I had no chance of passing a salute, and with great difficulty kept up with him. He indicated to me in no other manner that he did not accept the escort. He looked straight forward.

5. *Question by same.* Did you see Mr Tilden approach on the other side of the governor, and how was he received?

Answer. I saw Tilden only at the time he was moving from the ranks and when he was returning, I returned before he did.

6. *Question by same.* Where was the governor when you left your place in line, and where did you join him?

Answer. He was about half way between granite range and Park Street church, when I first saw him, and I joined him between the middle of the street, and the side-walk at Park Street corner.

7. *Question by same.* Was the governor intercepted or turned out of his course by any of the company?

Answer. I think not, I saw no one.

8. *Question by same.* Must you not have seen it, had it happened?

Answer. I should.

The court adjourned to meet again at twenty minutes past one o'clock this afternoon.

AFTERNOON, MARCH 22, 1832.

The Court met pursuant to adjournment.

Present. Brig. Gen. Wm. Peck, President. — Col. Thomas Davis; Col. Charles Lane; Lieut. Col. Abijah Ellis; Lieut. Col. Luther Eaton.

The Respondent was called and answered.

The Complainant was called and answered.

Mr Austin was again called.

1. *Question by Complainant.* Were the music on your right, when the company was formed in line in Tremont Street?

Answer. They were.

2. *Question by same.* Where was the right of your company at that time?

Answer. My impression is that the right of the company, exclusive of the music, was about against the second door in granite range.

3. *Question by same.* Where was its left, when you passed it?

Answer. The left of the company extended to nearly opposite the corner of the mall fence. It did not cross the flagging stones between granite range and Park Street corner.

4. *Question by same.* How did the company face, when it was formed in line?

Answer. I can't state positively. My recollection is indistinct.

5. *Question by same.* Was there a crowd about the governor when he crossed from the granite range to Park Street?

Answer. The crowd when he crossed was on his right side. There was no crowd between him and the company. When he stepped on to the side-walk he was then surrounded by a crowd.

6. *Question by same.* Was there a crowd in front of the company, when you marched to the head of Winter Street in column?

Answer. Being in the rear rank I could not see whether there was a crowd in front of the company; there was no more at the side than usual.

7. *Question by same.* Were there many persons on the side of the governor, when he met the company?

Answer. I can't state.

Question by Col. Davis. Was there any crowd between the company and the governor at the time he passed?

Answer. There was not.

Question by same. Did you see the governor all the time that he was passing the company?

Answer. I did.

Question by same. How far from the left flank of the company was the governor when he crossed the street?

Answer. From twenty to thirty feet.

Question by Judge Advocate. When the company was drawn up in line which way did it face?

Answer. My impression is that the company was drawn up diagonally between the head of Winter Street and Park Street corner, and rather facing Hamilton Place.

Question by President. Which flank of the company did the governor pass nearest to?

Answer. In my judgment, the left. There was not a great deal of difference.

Mr Daniel Parkman was called by Respondent and sworn.

1. *Question by Respondent.* What is the usual length of the services after the sermon on election day, and what are your means of knowledge?

Answer. From fifteen to twenty minutes. I have generally for the last twenty years attended the latter part of the services at the Old South, for the purpose of ascertaining at what time or how soon the services would be concluded, and what time might be calculated upon, after the sermon was concluded to the time the procession would leave the church. At the expiration of the sermon, I have uniformly left the church, and have almost uniformly found that from fifteen to twenty minutes have expired from that time until the services were entirely closed, as from twenty to thirty of the persons composing that procession have reported themselves at my father's house for dinner, without waiting the delay of the escort — they themselves came as soon as possible. A good many of the clergy have, for the last forty years, dined at my father's house, and some one has been detailed to give notice.

Question by same. Were you formerly a member of the Cadets, and had you at that time any experience upon the subject?

Answer. I was sixteen years ago an active member of the Cadet company. When under the command of Col. Lee, I recollect more than once on Election days, waiting before the Old South, (after we heard the singing commence) to receive the governor, more than seven minutes, the prayer having intervened, as I supposed from seeing the clergymen and the congregation standing. My impression about the prayer's intervening is strengthened, from the circumstance that the chaplains of the two Houses officiate on that occasion; one making the long prayer and the other the short one; on the fourth of July there is no second prayer.

3. *Question by same.* Do you know anything about the recent practice?

Answer. I have no reason to suppose it is different. I have usually left the church when the sermon has closed, have run home and in fifteen or eighteen minutes afterwards, the clergymen have arrived there.

4. *Question by same.* Did you attend the services at the church the last Election day?

Answer. I did not, we had no company on that day.

1. *Question by Complainant.* Where did your father live?

Answer. In Bowdoin Square.

2. *Question by same.* Did not the clergymen usually come together?

Answer. As a whole they did. But one or two were peculiarly remarkable for being on the spot two or three minutes in advance.

3. *Question by same.* How far is it from your father's residence to the Old South church?

Answer. Three minutes' walk. It is a quarter of a mile.

5. *Question by Respondent.* did you reckon the fifteen or twenty minutes up to the time of the arrival of the first of the company at your father's house, or that of the main body?

Answer. I reckon that the two gentlemen who used to come first were there in from fifteen to sixteen minutes, and the balance in about two minutes after. The first two must have have left the church a little before the services were over.

Mr Joel R. Mann was called by Respondent and sworn.

1. *Question by Respondent.* Were you out with the Cadets on Election day? If so, in what capacity?

Answer. I was out with them in the band, of which I am a member. I was the leader of the band and played the clarinet.

2. *Question by same.* Did you personally request Col. Winthrop to leave the meeting-house on that day? If so, why?

Answer. I told Col. Winthrop if we stopt there long, it was so cold we should not be able to play any, as the instruments were considerably frozen. This was the first time we came to the meeting-house from the Exchange. I told him so several times in the course of the day.

3. *Question by same.* Did you tell him so the last time the company was halted before the church?

Answer. I don't recollect that I did.

4. *Question by same.* Is it usual for the band, when paying a military salute to the governor, to play a full march?

Answer. It is not.

5. *Question by same.* Did you play a full march on the 4th January last, when at the State House, and if so, why?

Answer. We played nearly a full march. We had orders to play until the governor put on his hat, and as he stood where I could not see him, I played till I had orders to stop from Mr Simpson the drum major.

The court adjourned to meet tomorrow morning at half past 9 o'clock.

FRIDAY MORNING, MARCH, 23, 1832.

The court met pursuant to adjournment.

Present. Brig. Gen. Wm. Peck, President. — Col. Thomas Davis; Col. Charles Lane; Lieut. Col. Abijah Ellis; Lieut. Col. Luther Eaton.

The Respondent was called and answered.

The Complainant was called and answered.

The Judge Advocate read the record of yesterday.

Mr E. G. Austin wished to correct his testimony given yesterday before the adjournment, by saying, that when the governor passed in front of the company, the crowd was not around him, but on his right hand side.

Mr Joel R. Mann wished to correct the testimony given yesterday by saying that it was not the *first* time he was at the meeting-house after delivering the escort that he told Col. Winthrop that "it was so cold, if we stopt there long we should not be able to play," but it was the *second* time.

Mr Joel R. Mann was again called.

1. *Question by Complainant.* Whose clarionets were rendered useless at the time you informed Col. Winthrop as before stated?

Answer. Mine was for one. I know that two or three of the others were frozen up while we were out, but I cannot say they were at that time. Mine was the leading instrument.

2. *Question by same.* Did not the band play, whenever the drums and fifes ceased, through the day?

Answer. Not always, the company marched by the tap of the drum a part of the time.

3. *Question by same.* Where did they march by the tap of the drum?

Answer. From the Exchange the last time, to the meeting-house.

4. *Question by same.* Was that the only time?

Answer. I think it was not, I think they so marched through Pearl Street, that is all that I recollect.

5. *Question by same.* With those exceptions, did the band play when the drums and fifes ceased?

Answer. I think we did.

6. *Question by same.* Did the band play as the company approached the Exchange, the first time?

Answer. I think they did not.

7. *Question by same.* What music had you then?

Answer. Nothing but the drums and fifes.

8. *Question by same.* In what room did the band warm out their instruments at the Exchange?

Answer. Part of the band warmed them out in the bar-room, I don't know but they all did.

6. *Question by Respondent.* Do you know who played any instruments which were frozen up? If so, who?

Answer. Mr Sibley played a trombone, which was frozen. Mr Jones played another, Mr Kyburg played a valve trumpet which was frozen. My clarionet and that of Mr Boyd and Mr Richards were frozen. These were all frozen at one time, but I can't say they were all frozen when we came to the meeting-house the last time. It was while we stood at the meeting-house at one time, that those men showed me their instruments, but I cannot say it was the last time.

Mr Charles L. Tilden was called by Respondent, and sworn.

1. *Question by Respondent.* Are you a member of the Cadets? Were you out with them on Election day, and what duty were you detailed to perform?

Answer. I am a member of the Cadets. I was out with them on Election day, I was detailed, with Mr Austin, to escort the governor to the church, and marched on the governor's right and next to the adjutant general.

2. *Question by same.* When the company was drawn up in Tremont Street, were you detailed on the same duty, and if so, state what occurred?

Answer. I was detailed on the same duty. I left the ranks to take my station, and came up with his excellency just as he stepped on to the side-walk at Park Street corner and proceeded to take my station upon the right of his excellency again, and Gen. Sumner stepped in between me and his excellency and pushed me away one side. I was at *present arms*, at the time. I immediately came to a shoulder, and returned to the ranks.

3. *Question by same.* Did his excellency see you at that time?

Answer. I don't know whether he saw me. I should hardly think he could have avoided it; I might have been within three feet of him at the side.

4. *Question by same.* Did he notice your salute in any manner?

Answer. No.

5. *Question by same.* Why did you return to the ranks?

Answer. Because I considered that our services were not wanted.

1. *Question by Complainant.* Was I by the side of the governor when you took your position at his side?

Answer. You was a little in the rear.

2. *Question by same.* Was there a crowd about the governor?

Answer. There was a crowd around him when he stepped up on the side-walk. We were fairly on the side-walk when you stepped in between the governor and myself.

3. *Question by same.* How far on the side-walk?

Answer. Nearly to the corner of the church.

4. *Question by same.* Had the crowd then left you?

Answer. No.

5. *Question by same.* When I stepped between you and the governor, did I come up from the rear?

Answer. Yes.

6. *Question by Respondent.* When you went round the left flank of the company to join the governor in Tremont Street, were there disorder and confusion in the ranks, or were the men in military order?

Answer. They were in military order.

Mr James Braman was called and sworn.

1. *Question by Respondent.* Were you at the Old South on Election day, and if so, how employed?

Answer. I was employed to keep Faneuil Hall for the Cadets. After they left Faneuil Hall, they escorted the governor to the meeting-house. Some time after that I came across Col. Winthrop at the Exchange, and asked him if my services were wanted any more on that day. He told me he believed not. Then I went to the Old South, and before long, Col. Winthrop came up with his company. He came to the door of the church, and asked how long we thought it would be before the services were out; to this several of the constables stated, that they did not think the sermon was nigh out. Col. Winthrop said his company complained much of the cold, and the constables said they ought to go to some fire and leave a messenger there to give notice. The constables stated in particular that there would be time enough after the sermon and during the prayer and singing to give them notice. Col. Winthrop then asked me if I would not stop there and give them notice the moment the sermon was out. I told him I would. The

moment the sermon was winding up I started. I had been standing at the inside of the door of the church, I ran to the Exchange. The company was paraded in a room in the front part of the house. I told Col. Winthrop the sermon was out. He said to the company as soon as I gave him notice, *attention, shoulder arms*. I went up to the bar-room, on my way back, when I met Mr Mann going as he said to notify the company, I told him I had notified them. We started to run back together. A few steps from Milk Street, he made a halt, I kept on, and just as I got back to the church, the governor was coming out of the door. He turned his head down and up the street and started. I kept along with the governor till he got nearly to Bromfield's Lane. I made a little halt and looked back when I saw the company right behind me, I went up to Col. Winthrop, (he being at this time exactly opposite Bromfield's Lane) and stated to him — (at that time the governor was right opposite the Marlborough Hotel) that by going up Bromfield's Lane he could receive him at the head of Winter Street. Col. Winthrop then went up Bromfield's Lane on a trot, I keeping alongside of the music. After they got into Tremont Street, they made a little halt. He then marched the company down opposite the mall. I went by the side of the company until I was opposite Park Street corner; I then stopt, standing on the crossing stones, Col. Winthrop marched his company nearly opposite the head of Winter Street, I should say it was about to where the flag stones cross from the mall to Winter Street, and there formed line; I think I heard the word *present arms*. They presented arms after the governor came round the corner. The governor went from the corner of Winter Street, nearly in a straight line to Park Street corner and up Park Street. At the time the governor was marching from Winter Street to Park Street, Mr Tilden and Mr Austin went to the governor. They marched along by his side until they got on to the side-walk at Park Street corner, when some one pushed Tilden aside; Tilden then marched back.

2. *Question by same.* Was there any crowd between the governor and the company at the time he crossed over from Winter Street to Park Street corner?

Answer. I should think not. There were his aids and the officers who walked with him.

3. *Question by same.* Was the governor at that time in a situation in which he must have observed the salute of the company, and did he notice the same in any manner?

Answer. From the situation he was in, I should think he might have seen them ; I did not see as he did notice the salute.

4. *Question by same.* Was there any disorder in the company at the time the governor passed them ?

Answer. I should think not.

5. *Question by same.* Were any men of the company behind, towards Bumstead Place at that time ?

Answer. I did not see any.

6. *Question by same.* Did any of the company interfere with or interrupt the governor as he passed ?

Answer. I did not see any one out of the line except Mr Tilden and Mr Austin.

7. *Question by same.* Did the governor pass clear of the left of the line, and where was the left of the line ?

Answer. He passed clear of the left of the line. The left of the line was nearly up to Park Street about opposite the corner of the mall.

8. *Question by same.* Did you or not actually leave the church before the sermon was finished ?

Answer. The minister had shut the book, and I should think had closed before I got through the entry.

9. *Question by same.* Did you make any delay in going from the meeting-house to the Exchange to notify the company, and how long did it take you ?

Answer. I did not make any delay, I was between three and four minutes in going and returning. To ascertain the time I have been the ground over twice, and I walked it in four minutes.

10. *Question by same.* Did you see the company move from the Exchange ?

Answer. I did not.

11. *Question by same.* How long did you remain in the basement room, after you heard the word *shoulder arms* ?

Answer. Not a moment.

12. *Question by same.* When you got back to the church, did you hear or see anything of the company ?

Answer. I saw nothing of the company ; I heard the tap of the drum when the governor was turning round into Washington Street.

13. *Question by same.* Was you directed to reserve seats in the meeting-house for the Cadets ?

Answer. I was by a constable before the procession came, and went there and kept those pews till the sheriff and part of

the procession came in. The sheriff came up to me and asked me what I was doing. I told him I was keeping those pews for the Cadets. He told me not to keep them for the Cadets, but let any one go into them who had a mind to. They were accordingly occupied.

1. *Question by Complainant.* Where was you when the governor turned the corner of Milk Street into Washington Street?

Answer. I was at the corner of Milk and Washington Streets, by the jeweller's shop.

2. *Question by same.* Did you see the Cadets at that time?

Answer. I did not.

3. *Question by same.* Should you have seen them if they had been up Milk Street, so far as to be seen from the corner where you stood?

Answer. I don't think I looked back at this time, I was going very fast.

4. *Question by same.* How far did you keep along by the side of the governor, when you left the corner?

Answer. Nearly to Bromfield's lane.

5. *Question by same.* Why did you stop there?

Answer. I walked so fast, I made a little halt; I looked back and saw Col. Winthrop; I went up and spoke to him.

6. *Question by same.* How long did you halt before you spoke to Col. Winthrop?

Answer. It could not have been long, because he was not a great way behind me.

7. *Question by same.* How large was the procession with the governor at that time?

Answer. It would be impossible for me to tell, there were a good many people behind him, some were running and some walking. I could hardly tell who was in the procession.

8. *Question by same.* Did you see Col. Quincy when he came out of the door of the church?

Answer. I saw him when he came out of the door with the governor.

9. *Question by same.* Was you directed by Col. Winthrop to inform Col. Quincy, or any other person of the governor's staff where he had gone?

Answer. I was not. When Col. Winthrop asked me to notify him, there were several persons standing by; Mr Robinson was one, Mr Holden another, and I think there was another.

10. *Question by same.* Did you request any one of those

constables to give to Col. Quincy notice that you had gone after the company?

Answer. I did not.

11. *Question by same.* When the governor crossed from Winter Street to Park Street corner, was there a crowd on his right?

Answer. Not a great crowd, there were a few, the crowd was chiefly back of him. He went faster than the crowd.

12. *Question by same.* Was there any crowd about him when he stepped on to the side-walk at Park Street corner?

Answer. There were a few people standing at the corner.

13. *Question by same.* Did you see who pushed Tilden?

Answer. I did not. I saw him fall a little back.

14. *Question by same.* Did you see any person actually go against him?

Answer. I saw some person go against him who had a uniform on.

15. *Question by same.* Was he pushed sideways or backwards.

Answer. He was pushed a little on the side and back.

16. *Question by same.* How many officers in uniform crossed over with the governor from Winter Street, to Park Street corner?

Answer. I think there were two or three.

17. *Question by same.* Did you see them yourself?

Answer. I did.

18. *Question by same.* Did they keep by the governor's side?

Answer. They were pretty near, one of them I thought was a little behind. When they went on to Park Street corner Sheriff Sumner was near his side.

19. *Question by same.* Can you swear how many officers in uniform crossed over with the governor from Winter Street to Park Street corner?

Answer. I knew Mr Quincy, the other two I did not know; I believe there were three. There were two certainly.

20. *Question by same.* Did the two whom you saw keep by his side?

Answer. They did nearly by his side till he got on to Park Street corner, when one fell a little in the rear.

21. *Question by same.* Was Col. Quincy by his side when he crossed?

Answer. I think Col. Quincy stepped a little back to speak to one of the officers of the Cadets.

22. *Question by same.* Did you see him speak to the officer?

Answer. I saw him facing the officer. His back was towards me. I was standing on the flag-stones or nearly by them.

23. *Question by same.* What officer did he speak to?

Answer. I do not know.

24. *Question by same.* Where was he when he spoke to him?

Answer. I should think it was nearly by the middle of the company, or not far from that.

25. *Question by same.* Where did Col. Quincy leave the governor when he went to speak to that officer?

Answer. He did not exactly leave the governor to go to the officer, I expect he came by near where the officer was standing. The officer was in front of the company.

26. *Question by same.* Do you know where Col. Winthrop stood at that time?

Answer. I do not.

27. *Question by same.* Do you know the other officers of the Cadets besides Col. Winthrop?

Answer. I do part of them. I know Mr Thacher and Mr Sargent; I don't recollect the names of any of the others, though I know some of them by sight.

28. *Question by same.* Can you tell which of them it was, that Col. Quincy addressed?

Answer. I cannot, I did not take notice enough to observe.

29. *Question by same.* When the governor came up Winter Street was he in the middle of the road or on the side-walk?

Answer. When I first saw him, he was at the corner of Winter Street, on the side-walk.

30. *Question by same.* Were the two officers with him then?

Answer. I thought they were.

31. *Question by same.* Were there more than two at that time?

Answer. I don't know whether two or three.

32. *Question by same.* Which way did the officer face that Col. Quincy addressed?

Answer. I could not tell, I did not take notice enough to tell.

33. *Question by same.* Was it before the order to present arms, that he spoke to him?

Answer. It was after.

34. *Question by same.* Did Col. Quincy speak to the officer from the side-walk?

Answer. I should think not, it was crossing over from Winter Street to Park Street.

35. *Question by same.* Was the governor at that time in any part of the street crossing it?

Answer. He was, I should say, about half way between Winter Street and Park Street.

36. *Question by same.* Was Col. Quincy near the governor at the time he addressed the officer? And if so, how near?

Answer. I should think he was very near him.

37. *Question by same.* Do you or do you not know whether it was Col. Winthrop he addressed?

Answer. I do not know.

38. *Question by same.* Did you see Col. Winthrop when the company was formed in line?

Answer. I did.

39. *Question by same.* Where?

Answer. I saw him nearly on the right and I saw him at the centre.

40. *Question by same.* When was he on the right?

Answer. He was nearly on the right when the company had formed a line.

41. *Question by same.* When was he in the centre?

Answer. I think he went to the centre after the company had formed a line.

42. How long did he remain there after the word present arms was given?

Answer. I think till after the governor passed.

43. *Question by same.* Where was Mr Thacher at that time?

Answer. I don't recollect.

44. *Question by same.* Where was Mr Sargent?

Answer. I don't recollect, I saw him at the front of the company during the proceeding.

45. *Question by same.* Do you know the two majors of the Cadets by sight?

Answer. I do not. I know all of the officers by sight, but I don't know their names.

46. *Question by same.* What office does Mr Thacher hold?

Answer. I don't know.

47. *Question by same.* How then do you know he is an officer?

Answer. I saw his sword on his side.

48. *Question by same.* After Col. Quincy spoke to that officer, where did he rejoin the governor?

Answer. I don't think Col. Quincy stopt at all to make any halt. His conversation with this officer was when he was moving.

49. *Question by same.* Did Col. Quincy continue with the governor from Winter Street to Park Street corner or not?

Answer. I should think he did.

50. *Question by same.* Did you have your eye upon him, so that if he had left him, you should have known it?

Answer. I did not have my eye upon him more than I did upon the procession and the company.

51. *Question by same.* How then do you know that he continued by the governor's side?

Answer. I saw him on his side in Winter Street to Park Street. I don't say he was exactly at his side, all the time, but I saw him near the governor's side.

52. *Question by same.* Was Col. Quincy so near the governor's side that when you saw the one, you should have seen the other?

Answer. Yes.

53. *Question by same.* Did you go up from Park Street corner to the State House?

Answer. I did, I went with the company.

54. *Question by same.* Did you see the governor ahead, and how far?

Answer. I did not. I think when we got about half way up Park Street, the governor was going up the State House steps.

55. *Question by same.* Do you know how many officers were with him at that time?

Answer. There were two or three.

56. *Question by same.* Did you not mistake Sheriff Sumner for one of them?

Answer. I did not.

57. *Question by same.* Might you not have mistaken him, for one of them when crossing Tremont Street?

Answer. I think not, I know Mr Sumner.

58. *Question by same.* Which way did the company face, when drawn up in line in Tremont Street?

Answer. Granite row ; they were a little nigher the side-walk at the right of the company, than at the left.

59. *Question by same.* Were they drawn up in the carriage path ?

Answer. I think they were.

60. *Question by same.* Was there a snow-bank in front of the company ?

Answer. There was not.

61. *Question by same.* Was the snow-bank trodden down level up to the side-walk ?

Answer. I should think it was, there was a snow-bank back of the Cadets.

62. *Question by same.* Was there a crowd about the governor when he passed in front of the company ?

Answer. I should think not. The crowd was rather back of the governor towards Winter Street.

63. *Question by same.* How near the line of the company was the governor when he passed them ?

Answer. From six to ten feet, I cannot tell which.

64. *Question by same.* Did the governor pass diagonally across from Winter Street to Park Street corner ?

Answer. Nearly so. He might have gone into Tremont Street ten or fifteen feet before he left the side-walk.

65. *Question by same.* Are you sure he did not go more than that ?

Answer. I think not.

66. *Question by same.* Where did you stand when the governor passed by you ?

Answer. I stood near the flagging stones between granite range and Park Street church, and nearer to granite range than to the church ; directly after he passed me I walked along to the church.

67. *Question by same.* How near to you did the governor pass ?

Answer. Ten or twelve feet, he passed between me and the company.

68. *Question by same.* How far were you from the company when in line ?

Answer. Not far from twenty or twentyfive feet from the left flank, I mean where the governor passed.

69. *Question by same.* Was the space between you and the company all clear at the time he passed ?

Answer. I cannot say it was. There were people passing backwards and forwards, but there was not a large crowd.

70. *Question by same.* Was there a crowd behind you, or was you in a crowd?

Answer. There were considerable many behind me and round me, I should not say there were a thousand, I should not say there were five hundred. At the time the company halted there, a good many people were running up from different directions.

71. *Question by same.* Did you hear a shouting, when the governor passed the company?

Answer. I did not. After the governor got upon the sidewalk and the company began to move, I think I heard some hollowing of boys.

72. *Question by same.* When did the crowd begin to disperse?

Answer. After the governor had gone by and the company marched after him.

Question by Respondent. Was there any other officer so far in advance of the line, as the one to whom Col. Quincy spoke?

Answer. I think not.

Question by Col. Davis. Was it after the governor passed round the left flank of the company that Col. Quincy spoke to this officer?

Answer. I think it was when he was nigher to the right.

Question by same. If so, how could the governor be crossing the street at that time?

Answer. I don't say he was crossing the street at that time. After he got into Tremont Street he went a few steps to the side-walk, the company standing nigher the sidewalk on the right, would bring them at about an equal distance from his path.

The court adjourned to meet tomorrow morning at half past nine o'clock.

SATURDAY MORNING, MARCH 24, 1832.

The court met pursuant to adjournment.

Present. Brig. Gen. William Peck, President. — Col. Thomas Davis; Col. Charles Lane; Lieut. Col. Abijah Ellis; Lieut. Col. Luther Eaton.

The Respondent was called and answered.

The Complainant was called and answered.

The Judge Advocate read the record of yesterday.

Mr N. A. Thompson was again called by Complainant.

1. *Question by Complainant.* Are you a sergeant of the company of Cadets?

Answer. I am not.

2. *Question by same.* You before stated that you was clerk of the company of Cadets. Please now state how you were appointed?

Answer. I was chosen clerk by the company, by ballot.

3. *Question by same.* Have you any commission as clerk from the captain?

Answer. I have none.

4. *Question by same.* Have you taken an oath of office as clerk?

Answer. I never have.

The Respondent here offered certain records of the company, kept by the said Newell A. Thompson and his predecessors in the office of clerk, as above stated in evidence.

To the introduction of these records, as any legal evidence in the case, the Complainant objects, because a clerk of a company, chosen by ballot of the company, not being a sergeant of the same, nor commissioned by the captain, nor under oath, was not an officer known by the law, and therefore any records kept by said clerk, could not be competent evidence; but the complainant agrees, that said records may be used as evidence by either party, subject, however to be rebutted and controlled by any competent evidence *aliunde*, and the parties agree that true copies of any part of said records, which may be used in the case, shall be annexed, said copies are annexed, marked (15),

But are here omitted, as unimportant.

Dr John C. Warren called by Respondent and sworn.

1. *Question by Respondent.* Are you a surgeon and physician?

Answer. I am.

2. *Question by same.* Do you remember the state of the weather on the last General Election day? If yea, would it or not been hazardous to have kept men under arms a great length of time?

Answer. I recollect the weather last Election day; it was very cold, and I recollect it from the circumstance that one of my sons wished to appear with the Cadet company, and that I objected to it on account of the coldness of the weather, and the necessary exposure from a change of dress. I think it would have been hazardous to have kept young men, such as the Cadet company is composed of, under arms in a state of rest, for a great length of time.

3. *Question by same.* How long in your opinion could such men have been safely kept standing under arms on that day?

Answer. I should judge about fifteen minutes.

1. *Question by Complainant.* Did your son go out on that day?

Answer. He did.

2. *Question by same.* Did he suffer in consequence of it?

Answer. He did not.

3. *Question by same.* Are any members of the Cadets your patients?

Answer. I don't recollect any at this moment, there may be; upon reflection I do recollect one or more.

4. *Question by same.* Do you know of any members of the Cadets who suffered from exposure on that day?

Answer. I have not traced out any case so distinctly, but one case of sickness was suspected to have been produced by exposure on that day, I refer to the case of Mr Oliver, a son of Mr Francis J. Oliver.

5. *Question by same.* When was he taken sick?

Answer. He came from Cambridge unwell on the 10th day after Election, but I did not see him at that time, nor until three weeks after that tenth day. He is a student at Cambridge University.

Mr Josiah Smith was called by Respondent and sworn.

1. *Question by Respondent.* Was you out with the Cadets on Election day, and in what capacity?

Answer. I was, and played the fife.

2. *Question by same.* How was your instrument affected by the cold?

Answer. It was so cold that the bottom part of my instrument filled up with ice. I could get a high note but not a low one. I saw the man who played the trombone try to move the slide, but it appeared to me he could not.

3. *Question by same.* How long have you been a fifer?

Answer. Twentynine years.

4. *Question by same.* How often in that time have you know your fife to be frozen up?

Answer. Never before.

1. *Question by Complainant.* Cannot the key notes of the trombone be played when the slide is frozen?

Answer. I should think that would depend upon the place in which the slide was frozen.

Mr John Reed was called by Respondent and sworn.

1. *Question by Respondent.* Were you one of the constables in attendance at the Old South on Election day? If *yea*, state what passed to your knowledge between finishing the sermon and the arrival of the Cadets?

Answer. I was a constable and in attendance. During the services I stood in the broad aisle, very near the governor; after the services were over, there was a space of three or four minutes, then Col. Quincy went to the door, and after half a minute or a minute the governor spoke to me to go and call Col. Quincy. I went to the door and delivered my message to Col. Quincy, he immediately returned, and went to the governor; then the governor and all the officers went out.

2. *Question by same.* What order did the governor give you about going to call Col. Quincy?

Answer. He told me to step to the door and tell Col. Quincy to come in. He said it is no matter, as near as I can recollect.

3. *Question by same.* Had you, or any person previously in your hearing told the governor that the Cadets were not at the door?

To this question the Complainant objects as immaterial.

The court retired to deliberate. The court returned and decided that the objection to the last question be overruled.

Answer. Not as I recollect.

4. *Question by Respondent.* How long was it after the exercises were over until the governor left the meeting-house?

Answer. I should think from four to five minutes, but I can't tell exactly.

Mr Daniel Simpson called by Respondent and sworn.

1. *Question by Respondent.* Were you out with the Cadets on Election day, and if so in what capacity?

Answer. I was, and acted as drum-major.

2. *Question by same.* In what time did the Cadets move up Bromfield's Lane?

Answer. In double quick time.

3. *Question by same.* Were the company in line in Tremont Street, before the governor entered it from Winter Street?

Answer. I think the company went into line about the time the governor first made his appearance from Winter Street.

4. *Question by same.* Where were you standing and where did you first see the governor?

Answer. I was standing about in the centre of the street,

about two thirds of the way from Park Street to Winter Street. When I first saw the governor, he was coming up Winter Street.

5. *Question by same.* Please state anything that happened at that time, which is material?

Answer. The governor then stepped on to the side-walk in Tremont Street and passed along on the side-walk nearly as far as where the flagging stones cross from granite range to Park Street church. He then passed across from that side to Park Street corner and went up Park Street. I observed him particularly, the reason was, I thought he walked uncommonly fast, — when he came up, the company presented arms, but I noticed that the governor did not pull his hat off, nor make any halt.

The court here adjourned to meet on Monday morning next at 11 o'clock.

MONDAY, MARCH 26, 1832.

The Court met pursuant to adjournment.

Present. Brig. Gen. William Peck, President. — Col. Thomas Davis; Col. Charles Lane; Lieut. Col. Abijah Ellis; Lieut. Col. Luther Eaton.

The Respondent was called and answered.

The Complainant was called and answered.

The Judge Advocate read the record of yesterday.

Mr Daniel Simpson, again called.

6. *Question by Respondent.* Was the governor so situated as to see the salute of the company?

Answer. I should think he must have been. I can't say that he saw it.

7. *Question by same.* How near did he pass to the company, and which way did he look as he passed?

Answer. From eight to fifteen feet along the whole line; he looked pretty straight forward.

8. *Question by same.* Were there any persons between the governor and the company as he passed them?

Answer. I should say not between him and the right of the company, but there might have been between him and the left.

9. *Question by same.* Was the company in a disordered and scattered condition, or in military order when the governor made his appearance in Tremont Street?

Answer. About the same time that I first saw the governor, I think the company was throwing themselves into line, I did

not see anything of the company out of their places. If I saw any such, I do not now remember it.

10. *Question by same.* Did the officers take their post in front, and how near to Col. Winthrop did the governor pass?

Answer. I saw Mr Sargent in front on the right, and I believe Col. Winthrop was on the right of Mr Sargent, and a little in his rear. The governor might have passed within seven or eight feet of Mr Sargent and within ten or eleven of Col. Winthrop, though it might have been a little more.

11. *Question by same.* Did you see Mr Braman when he came to the Exchange to give notice that the sermon was done, and how soon after such notice was the company on its march?

Answer. I saw Mr Braman, and after I saw him, I think the company was under way in short of a minute; they shouldered arms and were advancing.

12. *Question by same.* At what time did you see Col. Winthrop on the right and in rear of Capt. Sargent?

Answer. I cannot say.

1. *Question by Complainant.* Where was Col. Winthrop when the company presented arms?

Answer. I think he was on the right and a little in the rear of Mr Sargent.

2. *Question by same.* Did the band play when the governor passed in front of the company?

Answer. My impression is they did not, I am pretty confident they did not, though I won't swear positively.

3. *Question by same.* Where were Major Inches and Major Barrett, at the time the governor passed?

Answer. I did not notice at all.

4. *Question by same.* Were there any persons between Col. Winthrop and the governor at the time he passed by him?

Answer. I should think likely there were. There were a great many standing round about as far as where Col. Winthrop stood, and where the band was.

5. *Question by same.* Did Col. Winthrop present his sword?

Answer. I cannot say.

6. *Question by same.* How near did Col. Winthrop stand to you, at the time of presenting arms?

Answer. I cannot say.

7. *Question by same.* Did you see him at that time?

Answer. I saw him at that time, or immediately before or after, I cannot say as to the moment.

8. *Question by same.* Why did not the band play when the governor passed?

Answer. I cannot tell.

9. *Question by same.* Is it not your duty as drum-major to direct the band to play such music as is proper for the occasion?

Answer. I have only acted twice, but when the governor makes his appearance and the company presents arms, the band has always played. They have so done for this twenty years, I have been with them that time, but not as drum-major.

10. *Question by same.* Did Col. Winthrop give you any directions to play when arms were presented?

Answer. He did not, at that time, he has given me directions to play when the company presented arms. In that case the music plays, without any particular order.

11. *Question by same.* Did Col. Winthrop give you any such directions that day?

Answer. He did, and a little different from what he ever had before; he said, we have heretofore played too short, and he wished us to play until the governor put his hat on or until the march was through, and that Gen. Sumner had requested it.

12. *Question by same.* Was the company at open order, when they presented arms?

Answer. I do not know.

Question by same. Where was the band situated in relation to the company at the time of the salute?

Answer. They were upon the right of the company and rather in its rear.

13. *Question by same.* Were they in line? in double or in single rank?

Answer. I think they were not in line. They were as much as four deep.

14. *Question by same.* How many drums and fifes had you that day?

Answer. One drum and two fifes. There was a bass drum besides.

15. *Question by same.* Where were the drummers and fifers at that time?

Answer. I do not know.

16. *Question by same.* Which way did the music face, at the time you describe them as being four deep?

Answer. They faced down Tremont Street.

17. *Question by same.* Does your band usually march four deep?

Answer. They do.

18. *Question by same.* Were their ranks in regular order at this time?

Answer. I cannot say that they were.

19. *Question by same.* Was you in front of the band when they faced down Tremont Street?

Answer. I was a part of the time.

20. *Question by same.* Why did you not wheel the band into line with the company?

Answer. I cannot say why we did not wheel into line with the company, but we did not. I cannot say whether it was because the spectators were in the way or not.

21. *Question by same.* When the company marched from the Exchange the last time, what music had they?

Answer. When they started, they started with the drums and fifes, but they marched so fast, and it was so slippery, that we could not beat, and so we kept time with one stick.

22. *Question by same.* What time did you march?

Answer. I think about one hundred and fifty steps a minute. It was quick time and rather crowded.

23. *Question by same.* How many beats to a minute is double quick time?

Answer. About one hundred and sixty to a minute.

24. *Question by same.* After the company wheeled from Congress Street into Milk Street, what music did they have in marching up Milk Street?

Answer. I believe they marched a few rods in Milk Street with fife and drum, and then took the tap of the drum.

25. *Question by same.* In what part of the street did the drum begin to tap?

Answer. I think it was not far from Federal Street.

26. *Question by same.* How far had the company then been marching with regular music?

Answer. I think from the Exchange to the place last named?

27. *Question by same.* When did the band begin to play?

Answer. I think the first time after that, that the band began to play was at the head of Winter Street.

28. *Question by same.* Where did you warm out your instruments at the Exchange?

Answer. I do not know; the band was dismissed, but where they went I do not know. I remained in the room with the company.

13. *Question by Respondent.* Was it the last or the first

time that you went to the Exchange, that the band was dismissed?

Answer. It was the first time, the last time we remained under arms.

Mr John L. Spear was called by Respondent and sworn.

1. *Question by Respondent.* Where were you when the procession came out of the meeting-house on Election day, and what did you see of the governor and his attendants, and of the Cadets? Please state particularly.

Answer. I left the church and came out of the side door into Milk Street when the sermon was ended. I stood opposite the church door on the other side of the street. In a very short time all the services were ended. I saw Col. Quincy come to the door in Milk Street, and in a very short time after that, the governor came out and went up the street. I looked after him and the crowd that followed him, and when he had got about to the corner, I looked down the street and saw the Cadets coming. They came directly up the street, and went through Washington Street, Bromfield Street, and into Tremont Street. I saw the governor go up Park Street, and he appeared to be in a great hurry.

2. *Question by same.* How long do you judge, after the sermon was ended, was it before the Cadets came in sight?

Answer. I can't give the precise time, but it was shorter than the close of any service I ever heard before.

1. *Question by Complainant.* Have you been in the habit of attending church on Election days, and if so how long?

Answer. I have been there before, but whether it was on the 4th of July, or on Election day, I am not certain.

2. *Question by same.* When Col. Quincy came out did you hear him make any inquiries?

Answer. I think I saw him speak to some one.

3. *Question by same.* Who walked fastest, the governor after he went out of the church, or the Cadets as they came up street?

Answer. I think the Cadets went rather faster than he did, I cannot say the difference.

4. *Question by same.* Where was the governor when the Cadets turned the corner of Washington Street?

Answer. I was in the rear of the Cadets and could not see.

5. *Question by same.* Where were the Cadets when the governor turned the corner of Washington Street?

Answer. I think they were about opposite Devonshire Street, or near there.

6. *Question by same.* Did you run after them up Bromfield's Lane?

Answer. I did.

7. *Question by same.* Where did you overtake them?

Answer. I think I overtook the main body of them opposite the tavern in Bromfield's Lane.

8. *Question by same.* Were any of the Cadets straggling behind the main body?

Answer. Two.

9. *Question by same.* Were those two near together?

Answer. Yes. I should think the rest of the company might be near the head of the lane, when they were opposite the tavern. By the tavern I mean the Indian Queen.

10. *Question by same.* Did you see where those men joined the company?

Answer. I did not.

11. *Question by same.* Did the company run very fast up the street?

Answer. They went much faster than any military people I ever saw before. I found it difficult to overtake or keep up with them.

3. *Question by Respondent.* Have you been a soldier or an officer, or in the habit of observing military parades?

Answer. No.

12. *Question by Complainant.* Was there a great crowd of people around the Cadets as they went through Bromfield's Lane?

Answer. There were considerable many people, but the Cadets left them all in the rear.

13. *Question by same.* Where did the crowd overtake the company?

Answer. I don't know.

Mr Lemuel Clark called by Respondent and sworn.

1. *Question by Respondent.* Where were you when the procession came out of the meeting-house on Election day, and what did you observe?

Answer. At the close of the service on that day, I was standing on the side-walk on the opposite side of the street. When the service was ended, I saw a number of people come out of the door. Being a member of the band, I felt somewhat interested to know what they were. I did not see them on the instant I began to walk. I walked as fast as I could on the same side of the way, until I got to the mansion-house in Milk

Street, and then halted. I turned round to the left, and looking towards the church, I saw an officer come to the door. I took him to be Col. Quincy, but I cannot testify it was he. In the space, I should think, of half a minute from that time, I heard a drum. Very soon after I saw a number of other persons come out of the door. I think the governor was among them. They paused a very short time, I should not think it was half a minute, and turned up towards Washington Street. Before the procession had turned the corner, the Cadets made their appearance. The Cadets passed me at the head of Devonshire Street.

2. *Question by same.* Were you at the time a member of the band, and if so, were you out on that day?

Answer. I was a member of the band and am now, but was not out with them on that day.

3. *Question by same.* Was it the head or foot of the procession, which had not turned the corner at the time you saw the Cadets?

Answer. It was the head.

4. *Question by same.* How long should you suppose it to be from the time Col. Quincy came to the door until you saw the governor?

Answer. It was a very short time, I should not think it was a minute.

1. *Question by Complainant.* How do you know the services were ended?

Answer. I don't know.

2. *Question by same.* How long did Col. Quincy remain at the door?

Answer. Not more than half a minute.

3. *Question by same.* How long was it after you heard the drum before the governor came out of the door?

Answer. It was not a minute; I was at the farther corner of the Mansion House, and at the corner of Morton Place.

4. *Question by same.* Were the drums and fifes playing or the band?

Answer. The band did not play at all. A fife was playing and a drum, but the drum was not beating in a regular way. I believe it was what the drummers call a tap. They were marching very fast.

5. *Question by same.* At quick time, or double quick time?

Answer. At quick time.

6. *Question by same.* How do you know when the governor turned the corner into Washington Street?

Answer. I do not know when it was.

The Court adjourned to meet this afternoon at half past three o'clock.

MONDAY AFTERNOON, MARCH 26, 1832.

The court met pursuant to adjournment.

Present. Brig. Gen. Wm. Peck, President. — Col. Thomas Davis; Col. Charles Lane; Lieut. Col. Abijah Ellis; Lieut. Col. Luther Eaton.

The Respondent was called and answered.

The Complainant was called and answered.

Major Lemuel H. Osgood was called by Respondent and sworn.

1. *Question by Respondent.* Were you formerly in the army of the United States? If yea, how long, and what office did you hold?

Answer. From 1812 to 1821. I was in the army. I was first appointed 3d lieutenant, afterwards 1st lieutenant, which was my last rank in the line. When 2d lieutenant, I was also brigade inspector and afterwards brigade quartermaster.

2. *Question by same.* Do you remember the weather the 4th of January last? If yea, would or would not troops in the regular service have been exposed in such weather?

Answer. I remember the day. On such a day as that was, I think men would be relieved as often as once an hour when on post as sentinels.

3. *Question by same.* If a company were ordered on a duty to be performed in an hour and a half, would or would not its commander have kept them exposed to such weather, while waiting for orders, unless expressly commanded so to do?

Answer. I cannot answer that question.

4. *Question by same.* Would or would not sentinels in the regular service be protected, in such weather, by great coats and be in motion?

Answer. In that service we could always protect ourselves by great coats and mittens, and could stand in the sentry box, or walk from one given point to another as we chose.

5. *Question by same.* Did you or not ever know an escort ordered for a commanding officer in actual service?

Answer. I don't know that ever I did. The commanding officer always had a guard, but never an escort.

6. *Question by same.* According to military usage, is it expected that a commanding officer will notice and return all military salutes paid to him?

Answer. I think so.

7. *Question by same.* Is it or not according to military usage to move Infantry at double quick time, without unfixing bayonets and at the trail when time is important?

Answer. Yes, it is.

1. *Question by Complainant.* Would you move men at double quick time with fixed bayonets, in column with but nine men in a section?

Answer. It would depend on circumstances. We move men in that condition generally by a flank, moving them so in column would endanger the men.

2. *Question by same.* Would not moving them in that manner, in slippery weather, and on snow, endanger the men?

Answer. I should think it would endanger the front rank, though I do not recollect ever seeing men move so, I have seen them move so at a charge and on ice.

3. *Question by same.* When moving in that manner at a charge, were not the men in line?

Answer. Yes.

4. *Question by same.* If you had occasion to move your company in a hurry from one place to another, would you move them in column or march them by a flank?

Answer. I should march them by a flank. I consider that the most expeditious and safe; all rapid movements that I have ever seen have been made in that manner.

5. *Question by same.* Is not that the most military manner?

Answer. Yes.

8. *Question by Respondent.* If you were in a hurry, having but a few rods to go, moving in column with open ranks, would you close your ranks and advance by a flank, or trail arms and proceed in column?

Answer. I should proceed as I was, as it would take some time to close ranks and move by flank.

9. *Question by same.* When you spoke of danger to the front rank, did you refer to column with open or closed ranks?

Answer. I think either are dangerous, but closed ranks more particularly, as the bayonets would be apt to be in the men's faces.

10. *Question by same.* Is there anything or not unmilitary or disorderly in moving in column, with open ranks, at double quick time, and bayonets fixed, in cases of emergency?

Answer. No.

6. *Question by Complainant.* What kind of emergency do you mean?

Answer. I consider getting to parade ground, or getting into a field of battle, an emergency.

7. *Question by same.* Would you go into a parade ground in that manner?

Answer. No. I would not form line in that manner. I would move in that manner to get to parade ground, on an emergency. But when I got within convenient distance of the ground, I should form my company and march them by flank.

8. *Question by same.* Do you know Bromfield's Lane in this city?

Answer. Yes.

9. *Question by same.* Would you move a company in such manner as before described, through such a lane when the snow was upon the ground, and the weather so slippery, that men might lose their places?

Answer. I might and I might not. It would depend on circumstances.

Mr Henry W. Dutton called by Respondent and sworn.

1. *Question by Respondent.* Are you one of the firm of Dutton & Wentworth, and are they the printers to the State?

Answer. Yes.

2. *Question by same.* Did you print an order of exercises for the last Election day?

Answer. No. I believe it is not customary.

3. *Question by same.* Was there an order of exercises printed for the 22d February last?

Answer. There was.

Mr Alonzo J. Lepean was called by Respondent and sworn.

1. *Question by Resp.* Were you in Milk Street on the 4th of January last, while the Cadets were before the meeting-house?

Answer. I was.

2. *Question by same.* At what time of the day was it?

Answer. It was after 3 o'clock, P. M.

3. *Question by same.* Was there a funeral in the street at that time? if yea, please describe the same.

Answer. There was a funeral. The carriages extended from near the Mansion House to near Federal Street.

4. *Question by same.* What was the appearance of the horses.

Answer. I saw that some of them were frightened by the crowd round there.

1. *Question by Complainant.* Where were the Cadets when the horses were frightened?

Answer. Standing opposite the church, I do not know whether there were any persons in the carriages or not.

Mr Timothy Coggeshall called and sworn.

1. *Question by Respondent.* Do you keep the public house in Milk Street called the Mansion House?

Answer. I do.

2. *Question by same.* What description of public house is the same? How was it occupied last Election day? and could you or not have accommodated the Cadets in said house, during the services in the church?

Answer. It is a stage house I accommodate the Citizens' coach company and travellers. I pretend to take no parties, for I cannot accommodate them.

3. *Question by same.* How was your house occupied on Election day?

Answer. With travellers and a few representatives who boarded with me, I generally accommodate a certain number and no more. I could not have accommodated such a company as the Cadets on that day.

1. *Question by Complainant.* Do you mean that you could not give them collation or dinner?

Answer. My house is quite small, and I could not have entertained that company satisfactory to them.

2. *Question by same.* Might they not have run in for ten or fifteen minutes?

Answer. They might have run in, and crowded as other people did.

3. *Question by same.* How many rooms are there on the lower floor of your house?

Answer. Seven, but only four proper to go into. I have a hall on the lower floor occupied by a table continually. At that table we can accommodate forty.

4. *Question by same.* Who owns the house?

Answer. Mr George Sullivan.

5. *Question by same.* Do you know whether it was ever occupied by Gov. Winthrop?

Answer. I do not.

4. *Question by Respondent.* Had you a room in your house, not otherwise occupied, in which the Cadets could have been drawn up under arms?

Answer. No.

6. *Question by Complainant.* In your dining room where forty men can sit at dinner could not sixty men have been drawn up under arms?

Answer. They could if I would take my table away, but this I should not have done. Sixty men might have stood in my entry, but it would have been too cold.

5. *Question by Respondent.* Would you have taken the Cadets in on that day?

Answer. If they had made application to me as a company to be accommodated I should have refused them.

The court adjourned to meet tomorrow morning at half past 9 o'clock.

TUESDAY MORNING, MARCH 27, 1832.

The court met pursuant to adjournment.

Present. Brig. Gen. William Peck, President. — Col. Thomas Davis; Col. Charles Lane; Lieut. Col. Abijah Ellis; Lieut. Col. Luther Eaton.

The Respondent was called and answered.

The Complainant was called and answered.

The Judge Advocate read the record of yesterday.

Mr Daniel Simpson again called.

1. *Question by Respondent.* Where do you mean to be understood Col. Winthrop was, when the governor passed in Tremont Street.

Answer. I cannot say where he was, when the governor passed, whether he was on the right or in front, for I was looking pretty sharp to the governor at this time.

The Respondent here rested his case.

Hon. Wm. Thorndike called by Complainant and sworn.

1. *Question by Complainant.* What office did you hold on last Election day? and was you in the procession that marched to the Old South?

Answer. I was President of the Senate, and I moved in the procession to the Old South, and remained there during the services.

2. *Question by same.* How long was it after the services closed before the procession went out of the door of the church?

Answer. I do not know, but the time seemed to be long. It might have been owing to our fatigue and the length of the time we had been there.

3. *Question by same.* How many minutes do you think it was?

Answer. It must be conjectural. There was an evident waiting for something, and under such circumstances time seems long. I should think it was ten minutes.

4. *Question by same.* Was you in the procession which returned to the State House?

Answer. I was. I went out of the church immediately after the governor.

5. *Question by same.* Were the Cadets in sight when you came out of the church door, or did you hear their music?

Answer. I did not see them, or hear their music.

6. *Question by same.* Where did you first see them or hear their music?

Answer. I do not recollect when I first heard their music. I first saw them in Tremont Street, at the head of Winter Street.

7. *Question by same.* Please describe the situation of the procession and of the Cadets at the head of Winter Street and in Tremont Street.

Answer. The procession was passing up the head of Winter Street, in the carriage way, there were but few in it; as we came to the head of Winter Street, I noticed the Cadets. The company appeared to be in line and the right of the line facing Winter Street, the most of the line being farther north. I then perceived that the governor and the gentlemen who preceded me passed off on to the side-walk on the eastern side of Tremont Street; soon after I noticed the governor attempting to cross Tremont Street, near where the flag stones are. I with the gentleman who was with me, did not attempt to follow the governor but attempted to pass the street diagonally from Winter Street to Park Street, and were checked apparently by some movement of the company. That movement appeared to be a wheeling of the company by sections or divisions from the right on the left. I supposed the object to be to go into open column to escort the governor, and I recollect being struck with some surprise at the whole company not following the first sections; one or two of the sections seemed to be separated from the company, that is, the other sections did not follow on immediately, and I supposed either that the order was not understood or that there was some confusion in carrying it into effect. I perceived then that the governor had passed the street and had preceded, as I think, those sections. In consequence of this manœuvre of the company, I and the gentlemen with me was separated from the procession and did not reach it again. I likewise lost the gentleman who was with me in the midst of the crowd and did not see him again. I got across the road at last, on to the side-walk in Park Street, passed up the street within view of the governor, and at no great distance till I arrived

at the corner of Park Street and Beacon Street, and I then concluded to turn off down Beacon Street, to my home.

8. *Question by same.* Please state whether or not, there was a crowd and confusion in Tremont Street at the time you passed?

Answer. There was a good deal of noise and quite a crowd. The crowd set up a loud shout, in consequence, as I then supposed, of the Cadets not being able to get ahead of the governor.

9. *Question by same.* Did you see the company in Tremont Street, before you came out of Winter Street into it?

Answer. I think I did the right of the company. I think they were west of the centre of Tremont Street.

10. *Question by same.* Was or was not the middle of Tremont Street occupied at that time, and how?

Answer. My impression is that the middle of the street immediately in front of the company was not occupied. On the left of the company the road seemed to be filled.

11. *Question by same.* Why did you not continue in the procession and follow the governor?

Answer. I thought I could take a more direct course across and not follow the governor, as the procession seemed to be broken up very much.

12. *Question by same.* Did you or not see any salute?

Answer. I did not see any.

13. *Question by same.* When the company were in line, were they in open or closed ranks?

Answer. I don't know whether there were two ranks or one.

14. *Question by same.* Did you hear any march played, or any music?

Answer. My recollection is not distinct.

15. *Question by same.* Was there or not a crowd in Tremont Street at the time and place the governor passed?

Answer. I think there was at the time, and at or very near the place.

16. *Question by same.* Do you know whether the governor passed through any crowd?

Answer. I do not know that he did.

17. *Question by same.* Please state the number of the people there, and their appearance as to order or confusion?

Answer. I cannot estimate the number; there was a crowd; I noticed no disorder; I heard shouting. There was some

running hither and thither, both of the company and the crowd. The company did not seem to be connected together as it usually is.

18. *Question by same.* Did you see any officers of the company at that time, and if so, where were they?

Answer. I do not recollect seeing any of them, I probably did, but don't recollect it.

19. *Question by same.* Had the officers been in front of the company, should you or not have seen them?

Answer. No doubt I should have seen them, but I have no recollection about it.

1. *Question by Respondent.* How far ahead of you did the governor pass the company?

Answer. Probably the full width of Tremont Street.

2. *Question by same.* Did you observe anything like disorder or confusion in the company before the governor had passed them?

Answer. I did notice what I called disorder in the company. Whether it was before or after he passed I cannot say, though it must have been about the time he passed.

3. *Question by same.* Did you observe any other disorder or confusion in the company, besides that which you have spoken of when they were endeavoring to break into column?

Answer. I did not.

4. *Question by same.* Did you mean to express a belief that the officers were not in front of the company while it was in line?

Answer. I did not mean to express any opinion about it.

5. *Question by same.* At what distance from the line of the company did the governor pass it?

Answer. He passed the front of the company on the sidewalk, while it stood west of the centre of the street. He must have passed very near the left of the line.

6. *Question by same.* At the time of his passing along the line of the company, was there any such crowd or other obstacle, between him and the company as to prevent him from having a full view of the company?

Answer. I should think not.

7. *Question by same.* Were you at that time, paying particular attention to the motions of the company?

Answer. My impression is that I was looking towards them, probably not paying particular attention.

8. *Question by same.* Did you mean to be understood as

stating positively that the company did not at that time present arms?

Answer. I do not know whether they did or did not.

9. *Question by same.* Did you see any attempt of the Respondent at any time to form his company in front of his excellency and so as to intercept his path?

Answer. I did not see the Respondent and did not hear his voice, but noticed an evolution of the company which appeared to be the result of an order, giving direction to the company towards the path of the governor.

10. *Question by same.* Did the purpose of that movement appear to you to be, to form a line in front of the governor and intercept his path?

Answer. It so appeared to me at the time. I supposed that the object of the company was to escort the governor.

11. *Question by same.* Did you see anything in the conduct of the Respondent or of the company under his command, which appeared to you indicative of intentional disrespect towards his excellency or the government?

Answer. I did not.

12. *Question by same.* What appeared to you to be the purpose for which the company was drawn up in line in Tremont Street?

Answer. To receive the procession.

20. *Question by Complainant.* What movement of the company was it, that led you to suppose it was the intention of the company to escort the governor?

Answer. The movement from the right of the company, which was not fully carried into effect. That led me to suppose that an order had been issued to go into open column.

21. *Question by same.* Did you see Col. Quincy at or about that time, and where?

Answer. I have no recollection of seeing him there at all.

22. *Question by same.* Did you ever have any military command? If so, what, when, and where?

Answer. About sixteen years ago, I was captain of a Light Infantry company in Beverly. I was in commission about two years, commencing some time in the war and terminating after it.

13. *Question by Respondent.* Have you attended at all since to military subjects, and are you acquainted with the present system of tactics established by the government of the United States?

Answer. I have not since attended to the subject, and am unacquainted with the system alluded to.

14. *Question by same.* Were you accustomed to manœuvre your company in single or in double ranks?

Answer. Generally double, often single and sometimes treble.

Gen. John McNiel called by Respondent and sworn.

1. *Question by Respondent.* Have you been in the United States service? If yea, when, how long and in what command?

Answer. I entered the service in 1812, and left it in 1830, so that I was in the service of the United States a little more than eighteen years. I entered in the rank of captain of infantry, promoted to major in 1813, to lieut. col. and col. by brevet in 1814, and continued in those ranks till 1824, when I had a brigadier's commission by brevet, and held that commission till I resigned in 1830. I have commanded regiments, stations and posts and districts. During a very considerable portion of the time I held a commission, I was in the field and in actual service; that is during the whole war, and a considerable portion of the time since.

2. *Question by same.* Is double quick time a regular motion of infantry, and on what occasions is it proper and usual?

Answer. Double quick time is not often practised. It is only in cases of necessity and emergency, by well disciplined troops. It is frequently practised on drill. What I mean by emergency is taking the advantage of ground when meeting an enemy; or to be in time to meet an order, in case any delay or casualty has happened to prevent being on the ground at the time, or in excessive stormy weather, where soldiers are exposed, in order to get them into shelter. Other cases might be named, but these are the most prominent.

3. *Question by same.* If a company of infantry, nine men in a section, marching in column at open ranks, and having occasion to be at a particular point, whether for parade or other duty, as soon as possible, should run at double quick time at the tap of the drum, with fixed bayonets, at the trail, a few rods, say forty rods; and when near the point to be reached, should halt, dress the ranks, and thence proceed in quick time; is or is not such proceeding unmilitary and disorderly?

Answer. It would depend on the nature of the service. If the nature of the service required the men to be at a certain point immediately, it would be proper that they should open ranks, trail arms, or go by file; both are practised; generally

where the ground will admit it, we go by open ranks. If the ground is narrow or obstructed, it is the practice to make file movements. This must be at the discretion of the officer. If the distance be considerable we usually unfix bayonets. If the distance be short, and the emergency great, we do not.

4. *Question by same.* Suppose a column, marching at open ranks, would or would not time be lost by closing ranks to make a file movement?

Answer. Of course so much time would be lost, as it took to change the position, and nothing would be gained in speed afterwards on good ground, but rather the reverse.

5. *Question by same.* Is it unusual in making such rapid movements for some men to fall in the rear?

Answer. It is not unusual for men to fall in the rear in slow or rapid movements.

6. *Question by same.* Would it be considered in service, a military offence, for a commander of a guard or escort of honor, who had accidentally failed to be ready to move with the officer to be escorted or guarded, to follow and overtake him on his way, and there offer to take up the escort or guard duty, or is it the duty of the officer so to endeavor to repair the mistake?

Answer. There are no duties of escort of honor in our service to my knowledge. We sometimes have small escorts in reconnoitring the enemy's lines performing the duties of the officer of the day, to protect him, &c. In respect to guard duties, if the commander of a guard had failed to perform his duty, or be upon the spot at the appointed time, from any accident or mistake, I should view it to be his duty to be there, as soon after as practicable.

7. *Question by same.* Suppose the commanding officer should send his aid-de-camp to an officer who was superintending a manœuvre of his command, to say that he had no further orders for him, would it or not be unmilitary or unofficerlike for such officer to march to the quarters of the commander, or whoever he might be, to ask if he had any further orders; and further, supposing that said officer did not understand the order communicated?

Answer. I should suppose that it would be the duty of an officer to ascertain to his own satisfaction, before leaving the ground, that his services were no longer required.

8. *Question by same.* Is it or not usual for commanding officers to acknowledge and return all military salutes paid to them?

Answer. It is usual, so far as my knowledge extends.

8. *Question by same.* Do you remember the weather on the 4th of January last?

Answer. I do not, I was at Washington.

1. *Question by Complainant.* If a company was in line and presented arms when its music was in column on its right, four deep, not having wheeled into line, and did not play a march, or receive you with the ruffles or honors due to your rank, and such company had not been before at its post in time to receive you as ordered, would you pass its line and acknowledge it as a proper salute?

Answer. I should not return a salute to a company unless it was in a proper condition to pay the salute in a soldierlike manner.

2. *Question by same.* Would the case supposed be a proper condition for a company to pay a salute?

Answer. It would not be in conformity with the practice of the regular service.

3. *Question by same.* If an officer whose command was detached for the performance of any special duty, was positively dismissed from further service on parade, for the day, would you consider it a proper military act, after you had gone to your quarters, for him to march his company there, and report for further orders?

Answer. I should not consider it proper, if he understood the order, that he was positively dismissed?

4. *Question by same.* If the commander of a guard, who had failed to be ready to receive you, when ordered to do so, should meet you in the road, would it be proper for him to form his guard in your front without making any explanation or without your order or permission?

Answer. It would depend on circumstances. If I entertained a belief that the officer had performed his duty in good faith, and that the delay was occasioned by any accident or misunderstanding, I should recognise him. If it were the contrary, and I supposed he had any intention of disrespect, or if I had any strong reason to believe he had been very negligent, I should not; and under such circumstances should arrest him and place some other man in command of the guard. I do not predicate this opinion upon any case I have ever known in the service, for I have never known precisely such a case. I have known frequent instances of mistake and accident, but never one just like the case supposed.

The court adjourned to meet again at half past 3 o'clock this afternoon.

TUESDAY AFTERNOON, MARCH 27, 1832.

The Court met pursuant to adjournment.

Present. Brig. Gen. Wm. Peck, President. — Col. Thomas Davis; Col. Charles Lane; Lieut. Col. Abijah Ellis; Lieut. Col. Luther Eaton.

The Respondent was called and answered.

The Complainant was called and answered.

Gen. McNiel was again called.

5. *Question by Complainant.* Would you march a company in column through a lane 20 feet wide, and 40 rods long, in a populous city, when there was a deep snow, and the path was slippery, and a crowd of people were about, at double quick time, with arms trailed, and bayonets fixed, on parade duty, or would you march by files?

Answer. I can't throw much light upon the subject, as it must be a matter of discretion. If in marching by column it would subject the citizens to great inconvenience or danger, and if in my opinion, by making a file movement, the desired object could be accomplished as easy, and with less injury to the multitude, I should in that case make a file movement.

9. *Question by Respondent.* If, on accidentally passing a single sentinel on post, he should present arms to you, should you feel bound to acknowledge the compliment or not?

Answer. I should feel bound to acknowledge it.

10. *Question by same.* If on accidentally passing a body of men under arms and in line, its commander should order it to present arms to you, and should himself drop his sword, should you feel bound to acknowledge the compliment or not?

Answer. I have always felt myself bound to acknowledge any compliment tendered me, either by an individual or a body of men.

11. *Question by same.* In the case supposed, of arms presented, by a body of men in line, not drawn up for review, but hastily and accidentally passed, would it or not be a circumstance to prevent your acknowledging the salute, that its music was not in line on the right or did not play?

Answer. If I thought the object was to pay me a compliment, and the occasion was accidental, I think I should acknowledge the salute.

6. *Question by Complainant.* If a salute were offered in an unmilitary manner by troops under your own command, and by an officer who knew his duty, would you receive it or call the officer to account?

Answer. I should think it my duty to state the error to the officer, or call him to account, as the nature of the case might require.

Mr Edward D. Bangs called by the Complainant and sworn.

1. *Question by Complainant.* What office do you hold in this Commonwealth, and were you at the Old South church on last Election day?

Answer. I am Secretary of the Commonwealth, and was at the Old South last Election day.

2. *Question by same.* Did you move in the procession and if so, what place did you occupy?

Answer. I moved in the procession and I walked immediately in the rear of the council. I walked with a member of the council, I think it was Mr Locke; a part of the time there were three of us together.

3. *Question by same.* Did you come out of the church with the governor, and were the Cadets at the door?

Answer. I came out immediately after the governor, and the Cadets were not at the door.

4. *Question by same.* Were they in sight, or did you hear their music?

Answer. They were not in sight and I heard no music.

5. *Question by same.* Do the public procession of the government usually move in the middle of the road or on the side-walk?

Answer. Usually in the middle of the road. I never went upon the side-walk in such a procession.

6. *Question by same.* Where did you first see the Cadets after you left the meeting-house?

Answer. As the procession approached near the head of Winter Street, I saw the Cadets in Tremont Street.

7. *Question by same.* Please state what occurred.

Answer. I was somewhat more in rear of the governor and suite at that time than commonly. I first saw the Cadets, as I thought, in the act of wheeling, between Winter Street and Park Street church, the head of the company being about against Winter Street. The governor, as soon as he reached the head of the company, turned, according to my recollection, to the right. Immediately after the governor turned to the right

the pressure of the crowd became so great, as to throw that part of the procession where I was into some confusion. I proceeded to follow the governor, but after moving a few steps, I found I should have to force my way through the crowd and I stopt, and let the multitude pass on. I afterwards made my way leisurely to the State House entirely disconnected from the procession. I think that after a minute or two from the time that I saw the governor turn to the right, I did not see him again till I saw him in the council chamber.

8. *Question by same.* Was there or not any crowd and any confusion in Tremont Street at the time the governor passed?

Answer. There was a crowd, and some confusion was produced in that part of the procession which I occupied. It was that circumstance that induced me to stop and leave the procession.

9. *Question by same.* How far was you in rear of the governor, when he turned on to the side-walk at the head of Winter Street?

Answer. I might have been twenty feet in his rear.

10. *Question by same.* Was or was not the procession broken up at that place, and if so, what was the cause?

Answer. The procession was in part broken up. I think all who were in the rear of me were disconnected from the procession; of this fact, however, I am not confident, as after I left the procession, I paid no farther attention to it, or to the military. The cause was the pressure of the multitude upon the procession. A part of this multitude were those, who attended the procession.

11. *Question by same.* What military officers were with the governor at the time he turned to the right as before stated?

Answer. My recollection is, the Adjutant General and Col. Quincy. I recollect no others.

12. *Question by same.* Did you see those officers, or either of them afterwards?

Answer. Not till I saw them in the council chamber.

13. *Question by same.* What was the appearance of the company as to military order?

Answer. I am unable to say, as I paid no attention to it at all, excepting that I saw the company afterwards marching up Park Street.

14. *Question by same.* Did you hear the band play or see the company salute at the time they were in Tremont Street?

Answer. I have no recollection of either. I heard music, but whether it was when the governor was passing the company I cannot say, because I have no distinct recollection upon the subject.

The court adjourned to meet tomorrow morning at half past nine o'clock.

WEDNESDAY, MARCH 28, 1832.

The Court met pursuant to adjournment.

Present. Brig. Gen. Wm. Peck, President. — Col. Thomas Davis ; Col. Charles Lane ; Lieut. Col. Abijah Ellis ; Lieut. Col. Luther Eaton.

The Respondent was called and answered.

The Complainant was called and answered.

The Judge Advocate read the the record of yesterday.

Col. James T. Austin, called by Complainant and sworn.

1. *Question by Complainant.* Was you an aid-de-camp of Gov. Gerry in 1812?

Answer. Yes.

2. *Question by same.* Please look at the record of the Cadet company for that year, and state whether the same be correct or not?

Answer. There is much in this record of which I can have no personal knowledge, whether it be correct or not.

3. *Question by same.* Please state what took place on Election day, 1812, when the Cadets overtook the governor and procession in Winter Street?

Answer. When the services of the church were over the Cadets were not on the ground. The governor, with such gentlemen as chose to form the procession, marched towards the State House without them, passing up Milk Street, Washington Street and Winter Street. Just as he was turning into Winter Street, the corps passed on his right in column, left in front on a run up Winter Street beyond the governor so far as to leave the right in the position they would have maintained had the escort been formed in the usual way. When the tap of the drum was heard, as they were coming, I asked the governor if he had any orders to give to the Cadets ; he replied "wait and hear what they say." When Col. Williams who commanded the Cadets on that day had got in front of the governor, he turned round and presented, and in a most earnest manner, said, "I assure your excellency upon my honor, it is an accident ; I beg

in God's name, you would not consider it a personal affront." He was about to make some other remark when the governor said "proceed, sir." The procession was then escorted to the State House and delivered in usual style; the officers then came into the council chamber and made further explanation. The language of the explanation I did not hear.

4. *Question by same.* Do you know whether the Cadets after delivering the procession at the Old South on that day were dismissed or not?

Answer. I do not now recollect.

5. *Question by same.* How long did the governor wait on that day at the church after the services?

The Respondent objects to the preceding question as irrelevant.

The court overrule the objection.

Answer. Just so long as was necessary to ascertain that the Cadets were not on the ground. I can't tell just the number of minutes, or seconds.

1. *Question by Respondent.* What reason do you know, for any peculiar solicitude of the commander of the Cadets on that day, to satisfy the governor that his failure to be on the spot was a mere accident?

Answer. I can't say that I know anything of my own knowledge. The circumstances were a matter of public notoriety. The political character of the governor and of the commander of the Cadets was decidedly opposed one to the other. It was a period of great party excitement and this was the last public appearance of the governor, as he was superseded that year by a man of different political sentiments.

2. *Question by same.* Was it not also a matter of public notoriety, that the whole body of the Cadets were politically opposed to the governor?

Answer. Yes.

3. *Question by same.* Was there not from these circumstances a general belief or suspicion of intentional slight on the part of the Cadets towards the governor?

Answer. I cannot speak of general opinion on the subject, as no time had elapsed to ascertain. It is obvious that it might be the opinion of individuals.

4. *Question by same.* Was there not a suspicion or belief in the mind of the governor and his staff, at the meeting-house?

The Complainant objects to the above question, as irrelevant and improper, and the court sustain the objection.

Col. Henry F. Baker was called by the Complainant and sworn.

1. *Question by Complainant.* Have you been a commander of the Cadets? If so, please state when and how long.

Answer. From 1826 to 1829, and from 1830 to 1831 there was an interval. In 1829 I resigned, and in 1830 I was re-elected.

2. *Question by same.* Will you look at the record of the clerk of the Cadets for Election day in 1828, and state whether the same be correct or not, and any facts relative to the matter there recorded?

Answer. There are some inaccuracies in the record to the best of my recollection, but none of much consequence.

3. *Question by same.* Please state what happened with reference to the escort of that day?

Answer. The governor was received at the State House by the company and with the procession was escorted to the Old South Church in the usual manner, I received from Col. Quincy, the aid of the governor, leave of absence for one hour. Before that hour had expired, the services of the church were ended and the governor returned to the State House without the escort. On my march down to the Old South to take up the escort, I was informed by a constable in front of the State House that the governor had returned and was in the council chamber. I halted the company, placed them under the command of the orderly sergeant and repaired with my other officers to the council chamber, where I explained the circumstances, made an apology, (although not in fault,) which was accepted, and I withdrew with my officers and resumed the command of the company. I wheeled my column into line and awaited the further orders of the commander in chief. Shortly afterwards Col. Quincy informed me, that the governor had no further use for the services of the corps on that occasion. The next day I resigned my commission and transmitted those of my other officers to the governor, but none of them were accepted. I sent a written communication and received one in reply, which are in the order book.

1. *Question by Respondent.* How long have you been connected with the corps, and during that period have the Cadets ever been into the meeting-house on Election day?

Answer. I have been connected with them about thirteen years. The Cadets were never within my recollection marched into the meeting-house on Election day.

2. *Question by same.* Have they ever waited outside the meeting-house from the delivery of the procession until the services were ended?

Answer. Never within my recollection.

3. *Question by same.* Have any, and if any, what orders been given to the commander of the Cadets, by the governor, as to the manner in which the escort duty shall be performed?

Answer. I never received any orders other than the written orders, issued from the Adjutant General's office.

4. *Question by same.* What orders have been usual after the delivery of the procession at the meeting-house as to the time of returning?

Answer. The company were always relieved for a limited period of time, differing at different times; sometimes it has been for one hour and sometimes during the services.

5. *Question by same.* Have you ever known the company, on their return to the church and finding the services still in progress, to march away again?

Answer. I have no distinct remembrance of any such occurrence. If we had remained at the church, it might be easily explained, as the weather has always been pleasant.

6. *Question by same.* When the company have been ordered to report themselves at or after a specified time, in what form has it been usual to make the report; or has it been usual to make any report until the services were ended?

Answer. I have usually paraded the company facing the meeting-house, and have myself taken a station in front of the door, so that I might see the officer and be seen by him, when the services were ended.

7. *Question by same.* What was the precise order given you in the year 1828? please state the precise language if you can.

Answer. I cannot, I can state the purport, but cannot now recall the language.

8. *Question by same.* Do you mean to state positively, that you were dismissed from duty by that order for one hour?

Answer. I do.

9. *Question by same.* How long according to your recollection was the company at your house on that day?

Answer. I should think the record of the company was correct; about three quarters of an hour, but it is impossible for me to state positively how long.

10. *Question by same.* Where did you then live, and at what distance from the Old South?

Answer. I lived at No. 8, Chesnut Street. It is about five minutes' walk. The company were marched very quick.

11. *Question by same.* Do you mean to state positively, that you reported at the State House, within one hour from the time, when dismissed from the church?

Answer. By my time it was within one hour; by Col. Quincy's it was five minutes after, and that was the ground upon which I rested my defence.

12. *Question by same.* Did you then consider that you had broken no order and had acted fairly within the discretion given you?

Answer. I considered myself liable to censure as my letter to the governor shows; at least, I should have felt it my duty to have been on the spot, to perform the duty required, although in a military point of view, I was not bound. If I had known that Mr Walker's sermon on that occasion would have been but fifteen minutes long instead of two hours, I should have been there at the close of the services.

13. *Question by same.* Upon what precise ground did you consider yourself liable to censure, and whose censure do you mean?

Answer. Upon a mere point of etiquette, the Cadets claiming the rank, honor and privileges of being the governor's body guard. I meant the censure of the commander in chief.

14. *Question by same.* Do you then mean to say, that you considered yourself liable to censure by the commander in chief for not being on duty, when he had expressly dismissed you from it?

Answer. I did so consider it at the time, for the reasons before stated, and acted upon that conviction.

15. *Question by same.* Who has been in the habit of making up the records of the proceedings of the Cadets, and does the form of the same come at all under the cognizance of the commander of the corps, until after they are made up?

Answer. For the last ten years they have been made up by the clerk. The form does not come under the cognizance of the commander until after they are made up, at least, I never exercised that right.

4. *Question by Complainant.* Have or have not seats been usually reserved in the meeting-house on Election day for the Cadets?

Answer. They have generally, that is, the constables have told me so at the door, both on Election and Independent days.

5. *Question by same.* Have they ever been occupied on either of those days to your knowledge?

Answer. Always I think on the 4th of July by the Cadets. As I stated before, I have never known the Cadets marched into church on Election day, but when Dr Channing preached the Election sermon, some of the company, perhaps half a dozen, went in and occupied the seats reserved.

6. *Question by same.* Do you know anything of the appearance of the company on Election day in Tremont Street? If so please state what it was.

Answer. I saw them from the head of Park Street apparently filing in front of granite range. I saw them subsequently countermarch and move off.

16. *Question by Respondent.* Had you ever a very precise order as to the time, you should return to the meeting-house, previous to 1828.

Answer. My impression now is, that they were unlimited as to time, or discretionary, but I do not state this positively.

17. *Question by same.* Do you remember the weather on the 4th of January last? If yea, should you have deemed it prudent and officerlike as commander of the corps, to have kept your men exposed to it without an express order so to do?

Answer. I remember the weather; I should not have thought it proper to have kept men exposed without express order. I should have done, what I had done on a previous occasion, that is, marched into the meeting-house. The occasion referred to was in August last, when a eulogy was delivered on President Munroe, when it rained very hard.

7. *Question by Complainant.* After leaving the procession at the meeting-house, did you ever march away, without permission so to do?

Answer. I always waited at the door with my company, until one of the governor's aids came out and relieved me from duty.

The court adjourned to meet at half past 3 o'clock this afternoon.

WEDNESDAY AFTERNOON, MARCH 28, 1832.

The court met pursuant to adjournment.

Present. Brig. Gen. William Peck, President.—Col. Thomas Davis; Col. Charles Lane; Lieut. Col. Abijah Ellis; Lieut. Col. Luther Eaton.

The Respondent was called and answered.

The Complainant was called and answered.

Adjutant General Wm. H. Sumner again called.

1. *Question by Judge Advocate.* Please state what you know relative to any reservation of the pews in the meeting-house for the Cadets?

Answer. Since I have been connected with the command in chief, either as adjutant general, or aid-de-camp, there never has been an occasion to my recollection, on which pews were not reserved for the escort of the government, either on Election or Independent days.

2. *Question by same.* Please state what you saw at the head of Winter Street, and in Tremont Street last Election day, when the procession was returning from the meeting-house?

Answer. I was by the side of the governor, and when we arrived at or near the head of Winter Street, I saw the company of Cadets in the middle of the road in Tremont Street. The procession was at that time, moving up in the middle of Winter Street. The governor, at the time, observed, this won't do; or something to that effect, and turned off from the middle of the road on to the side-walk in Tremont Street. He proceeded some ways and crossed towards Park Street church, and at that time I have no recollection of being by his side or very near him. I must have been in his rear, because I overtook him afterwards. When I came up with him on the side-walk of Park Street, I went with him to the State House. If Mr Tilden was on his side at the time I came up, I have no distinct recollection of the circumstance, and if I pushed him aside on coming up behind him it was entirely unintentional, and was probably done by my taking my proper position between him and the governor. In relation to the fact stated in the company record, which says, "*This movement of his excellency, &c, &c,*" I can positively declare that his excellency did not confer with me at all upon the subject, nor I with him; neither did I know, that Col. Quincy had been despatched with an order to dismiss the company from further service until some time afterwards.

3. *Question by same.* Did you hear the testimony of the Hon. Mr Thorndike, and of the secretary of state? If so, please state whether the same, as far as your knowledge extends, was correct or not, in relation to the appearance of the Cadets and the procession at the head of Winter Street, and in Tremont Street?

Answer. In relation to that subject, I can say, that when I saw that the governor did not intend to be escorted from that place to the State House and stepped aside, I followed him as near as I could, without taking any particular observation of the company. I saw no salute and heard no music. As I did not take particular notice of the Cadets, I am not able to state whether the facts testified to by them, in relation to the Cadets, were correct or not.

1. *Question by Respondent.* At what hour did you make out and deliver the order to Col. Quincy for the arrest of the Respondent, and at what hour did you receive orders so to do?

Answer. I delivered the order to Col. Quincy about an hour or an hour and a half after candle-light, as soon as it was prepared for him; I received the directions of his excellency to prepare it after he had returned from his dinner at his lodgings, and immediately before I commenced writing the order. I should think it was after candle-lighting, but cannot state positively.

Col. Josiah Quincy, Jr, called again by the Complainant.

1. *Question by Complainant.* When you delivered the order to Capt. Sargent after the delivery of the escort at the church, to report after half an hour, did you add any suggestions of your own, and if so, what?

Answer. As I before stated, I added something to this effect, you must be here, or you must be careful to be here, at the conclusion of the services. I do not exactly recollect the phraseology, but I am certain as to the import. I am sure that I said nothing concerning being at the door, or receiving a report from Capt. Sargent, at the end of half an hour, for I knew from the situation I always occupy in the church, that it would be impossible for me to have any communication with the company during the service, without disturbing the whole congregation. Capt. Sargent must certainly have misunderstood me.

2. *Question by same.* Did you afterwards make any memorandum of the words in which you gave the order to Capt. Sargent? If so state when.

Answer. I did immediately on my return to the council chamber, and I had those minutes before me at the time I testified before.

3. *Question by same.* When you went to the door of the church to see if the Cadets were ready to resume the escort, do you recollect seeing Mr Robinson the constable?

Answer. I cannot say that I recollect seeing Mr Robinson there were some constables there, but I do not know their names.

4. *Question by same.* Do you remember hearing any person say that a messenger had been despatched after the company, and that in all probability, they would be there in a few minutes?

Answer. I do not, I could not learn at the door, where the Cadets were.

5. *Question by same.* When you delivered his excellency's order to Col. Winthrop in Tremont Street, dismissing him from further service that day, did he make you any reply, or otherwise signify to you that he understood the purport of the order?

Answer. Col. Winthrop did not make any reply; I did not wait for one, because I did not consider that the message required any, but from the situation in which I stood, and from the manner of Col. Winthrop, I had not at the time the slightest doubt but that he heard and comprehended the order.

1. *Question by Respondent.* What did you understand to be the object of the inquiry made by Capt. Sargent at the council chamber, after said order?

Answer. Nothing except to know if there were any orders for the company. I did not suppose there was any sinister object.

2. *Question by same.* Did you say to Capt. Sargent, or did his excellency say, that the Cadets were already dismissed, or anything to that effect?

Answer. I believe his excellency's words were, I have no further orders.

3. *Question by same.* When you received the order in Tremont Street, did you understand that his excellency did not wish the Cadets to take up the escort at that time or place, or that he wished to have no further communication with them on that day, or what precisely did he mean, as you understood it?

Answer. I understood that it was his intention to dismiss the company altogether for that time, and to have no further communication with them as a corps during that day.

4. *Question by same.* What was the message given you, exactly, at that time?

Answer. As near as I can remember it was, "Tell Col. Winthrop, I have no further orders for him."

5. *Question by same.* Could you not at the meeting-house have sent one of the constables to the Cadets without disturbing the congregation, when they were at the door?

Answer. I think I could not. I sit on those occasions in the immediate vicinity of the pulpit, and I could not speak to a person, in that situation without attracting the attention of the audience.

6. *Question by same.* Can you state what order you gave to Col. Baker in 1828, when he had delivered the escort at the meeting-house?

Answer. I cannot recollect the exact phraseology, the purport was, that he should report in an hour.

7. *Question by same.* How long did his excellency wait for the Cadets at the meeting-house on that occasion?

Answer. My impression is that immediately on my communicating to him, that the company were not in readiness, he said it would not do to wait, or something to that effect, and left the church.

8. *Question by same.* Will you undertake to swear that that was the fact?

Answer. I will, that it was the fact according to the best of my recollection; I recollect the circumstances on that day as well as I do anything at that distance of time.

9. *Question by same.* How long after the expiration of the hour was it, before Col. Baker reported at the State House?

Answer. I cannot state exactly, but I know from some circumstances that the hour for which the company was dismissed had elapsed before the governor left the church, he returned immediately to the council chamber, where he had not been many minutes, before the company appeared in front of the State House.

6. *Question by Complainant.* Who delivered the message to you when at the door of the church and looking for the Cadets, last Election day, to return to the governor?

Answer. I am very certain it was Sheriff Sumner.

7. *Question by same.* Did you receive any such message from a constable?

Answer. I received but one such communication, and that I am confident was from the Sheriff.

8. *Question by same.* Do you know Mr Murdock, a member of the Cadets, and did you see him in church that day?

Answer. I have no recollection of it, I believe I know him.

Mr Edward Stow again called.

1. *Question by Respondent.* Is the order of arrest, which

was served upon the Respondent, and now exhibited to you, in your hand writing?

Answer. It is.

2. *Question by same.* At what hour of the day, did you write it?

Answer. I can't distinctly recollect the hour of the day, but I should think it was about six o'clock or after.

3. *Question by same.* Did you state to Mr Dexter this afternoon, that it was written after dinner, and before candle-light?

Answer. I did after dinner, I don't think I said before candle-light.

4. *Question by same.* After you spoke with Mr Dexter did you go and speak with General Sumner, and before you was called to testify?

Answer. Yes.

5. *Question by same.* What was the conversation between you? state particularly.

Answer. The general observed that I should be examined with respect to writing the order, I recollect nothing further.

6. *Question by same.* Do you mean to say that nothing was said to you by General Sumner, about the time the order was written; or whether it was written by daylight or candle-light?

Answer. He never said one word to me about it in that respect.

Franklin Dexter, Esq. called by Respondent and sworn.

Question by Respondent. What did Mr Stow state to you just before he was called, as to the time when the order of arrest was written?

Answer. Something more than half an hour I think before Mr Stow was called, I went to Mr Stow and asked him at what hour the order of arrest was written. His answer was, after dinner. I asked him at what hour of the afternoon. His answer was not very precise, but I think it was, soon after dinner. I understood him to mean soon after dinner. I then asked him if it was written before candle-light. He answered without any hesitation, yes: and I came back and so reported to Mr Gardiner and to General Sumner.

Col. Josiah Quincy, Jr, again called.

Question by Complainant. Was you in my office when the order for the arrest of Col. Winthrop was issued? And was it before or after candle-light?

Answer. Some time after I knew it was the intention of his excellency to arrest Col. Winthrop, and after I had heard the order given to General Sumner to carry it into effect, I went home, changed my dress and waited until I supposed the papers must be prepared. I returned to the Adjutant General's office, I believe after candle light and found that owing to some alteration in the original draft, the papers were not finished. After the Adjutant General had finished writing he gave the order to Mr Stow to make two copies. As it was necessary that there should be two copies I began to make a copy for myself from General Sumner's draft, at the same time with Mr Stow, but feeling an unwillingness to have the copy in my hand-writing, I did not finish it, but waited until Mr Stow made two copies; which took a long time to do. I know that it was after candle-light, because I remember the situation of the lights, as we stood together at the desk in the Adjutant General's office.

Question by Respondent. At what hour did the governor order General Sumner to prepare the order of arrest?

Answer. I cannot state exactly. It was I think more than an hour after our return to the State House.

The court adjourned until tomorrow morning at half past 9 o'clock.

THURSDAY, MARCH 29, 1832.

The court met pursuant to adjournment.

Present. Brig. Gen. Wm. Peck, President. — Col. Thomas Davis; Col. Charles Lane; Lieut. Col. Abijah Ellis; Lieut. Col. Luther Eaton.

The Respondent was called and answered.

The Complainant was called and answered.

The Judge Advocate read the record of yesterday.

Mr Newell A. Thompson called by Respondent.

1. *Question by Respondent.* Who made up the record of the proceedings of the Cadets, last Election day?

Answer. I made them.

2. *Question by same.* Had you any direction or advice respecting them from the Respondent, and when did he first see them to your knowledge?

Answer. I had no direction or advice from the Respondent, nor do I know that he has ever seen them.

3. *Question by same.* How long after the 4th of January was it that you made up the records?

Answer. Immediately after. In a day or two.

4. *Question by same.* Upon what ground did you state in the record, that there were printed orders of exercises in the meeting-house that day?

Answer. I made an inquiry of some one, who I understood was in the church that day, and was so informed. I did not know it of my own knowledge.

5. *Question by same.* Has it been usual for the commander to give any direction about making up the records, or to have the custody of them?

Answer. It never has since I have been clerk of the corps.

1. *Question by Complainant.* Had you had any conversation with Col. Winthrop, previous to the records being made, relative to the proceedings of the company on Election day?

Answer. None to my knowledge.

2. *Question by same.* How did you know the fact, that the government procession proceeded through Washington Street, in a state of disorder and confusion on that day, as stated upon your record?

Answer. I have stated before, that I saw the procession, after I turned the corner of Milk Street; it appeared to me then to be in a state of disorder and confusion, and I heard so from others.

3. *Question by same.* How did you know that Col. Winthrop had a right to suppose, and did suppose, that the usual services would be performed, as stated in the record?

Answer. In making up these records, I was under the direction of no one. I made up the records from my own views of the subject.

4. *Question by same.* How did you know that, instead of the performance of the usual exercises or a proper proportion of them, all were dispensed with, with a slight exception, as you have stated in the record?

Answer. I only know it from hearsay, I had no doubt of the fact, having heard so at the time. If I mistake not, I was so told by Mr Freeman, at that time a member of the council, though I do not state this positively.

5. *Question by same.* Can you undertake to swear, that the statements recorded by you are true?

Answer. I did not make the records with an expectation of being called to swear to them; I made them up from opinion. It was my opinion at the time, that they were correct, and I now suppose that they are, or as near so as is necessary.

Capt. Henry W. Sargent called by Respondent.

1. *Question by Respondent.* When Col. Quincy delivered his orders to you at the meeting-house door, did he or not give you any caution, to be back by the time the services were over?

Answer. If he gave any I did not hear it.

2. *Question by same.* Are you or not confident that Col. Quincy said, he would come out or send out on your return at the expiration of the time limited, and give you further orders?

Answer. I am extremely confident that he said so. I understood him so, whether he said so or not.

3. *Question by same.* Did you or not so report to Col. Winthrop at the halt in Milk Street?

Answer. I did so report to him there, and also at the Exchange, and it was in consequence of that, that Murdock was despatched to the church. What makes me more confident is, I advised Col. Winthrop to send Mr Murdock up to the church, to wait for further orders, which would not otherwise have been done.

4. *Question by same.* When, where and to whom did you state what Col. Quincy said to you on that occasion, and was the same written down from your statement at any time, and if so when and by whom?

Answer. I first stated the next morning what Col. Quincy's order to me was. I cannot mention all the persons to whom I have stated it since. I should think a hundred or more. It was in Col. Winthrop's office the next morning that I first stated it; five or six gentlemen were in the room, but I recollect no one except Mr Thacher and Mr Perkins; Mr Perkins is now gone to the south. I also stated it to Mr Wm. H. Gardiner, who took it down in writing. I think it was within a week that I made this statement to Mr Gardiner, and it might have been in three or four days. The memorandum made by Mr Gardiner, I heard read at the time by him.

5. *Question by same.* Is the memorandum now shown to you in the hand writing of Mr Gardiner, and is the statement therein contained the same you made to him at the time it was written?

Answer. It is the same. I know the hand writing of Mr Gardiner.

1. *Question by Complainant.* Please read the memorandum made by Mr Gardiner, and which you now say is correct.

Answer. "Col. Quincy's order to me, on the governor's entry at the Old South, was, 'you will report yourself in half an hour or more, or and more,' I am not sure which, I said, I

did not distinctly understand the order. He repeated it in the same words, with this addition, I will be out or send out and give you further orders ; my impression is that he said, he would come out himself. The company was then countermarching, I delivered the orders so received to Col. Winthrop, and repeated it at the Exchange and suggested the sending the orderly to the meeting-house to receive the order. He was sent ; we waited more than half an hour, and he not returning we marched up."

2. *Question by same.* Did you approach and speak to Col. Winthrop for the purpose of delivering that order before he had halted his company ?

Answer. I believe that I did.

3. *Question by same.* Did you halt in column ?

Answer. We did.

6. *Question by Respondent.* Do you know for what purpose the company first moved from the meeting-house, after delivering the escort ?

Answer. I believe on account of the snow, which was very deep and very inconvenient. There was more snow immediately in front of the church than below it. The street below was broader and clearer.

4. *Question by Complainant.* Did Col. Winthrop tell you at the time, that he moved the company away on account of the snow, or was it your own supposition.

Answer. He did not tell me ; I heard a number of the company complaining of the snow, and also heard Col. Winthrop say, I will get you out of it, or something of that sort.

5. *Question by same.* To whom did you hear him say so ?

Answer. I do not know ; he said it aloud, apparently addressing all those near him, that complained.

Mr Wm. Garfield called by Respondent and sworn.

1. *Question by Respondent.* Were you a domestic in Col. Winthrop's family, last Election day ?

Answer. Yes.

2. *Question by same.* Was the packet now exhibited to you, or one similar to it, left at his house, on that day, and if so at what time ?

Answer. Either that or one similar to it, was left there a quarter before six o'clock in the afternoon ; I can't say that that is the one.

3. *Question by same.* Are there any circumstances, that fix the time in your mind ? if so, please to state them.

Answer. I generally make it my rule, or did at that time to put up the entry lamp at five o'clock, or a little after. I did what I had to do at the barn that evening, lit the lamps, and had carried some coal up to make a fire, when I heard the bell ring, and on going to the door, I received that packet or one like it.

4. *Question by same.* Had you any reason for being in haste that evening or not?

Answer. I had, as I was going out.

5. *Question by same.* When the packet you refer to was brought, was it daylight, dusk or dark?

Answer. It was dusk.

6. *Question by same.* How long had you then lived with Col. Winthrop?

Answer. I went there Dec. 5th, and had been there afterwards up to this time.

7. *Question by same.* How long after you received the packet, before you went out for the evening?

Answer. I should think not more than fifteen minutes.

1. *Question by Complainant.* To whom did you deliver the packet you received?

Answer. I delivered it to a girl, who was in the entry, and was going into the room where Col. Winthrop was.

2. *Question by same.* Was there a lamp in the parlor at that time?

Answer. Yes.

3. *Question by same.* Did you examine the packet at the time particularly, or pass it into the hand of the girl immediately?

Answer. I passed it to the girl immediately; she was then going into the parlor.

4. *Question by same.* Was Col. Winthrop in the parlor at the time?

Answer. I don't know.

5. *Question by same.* Did you not see him?

Answer. I went in immediately after with some coal, and he was in then.

6. *Question by same.* Did you look at the clock to ascertain the time?

Answer. I did not, but I went out about six, and when I saw him in the parlor, it was before six.

7. *Question by same.* When was you first spoken to about the time?

Answer. Yesterday the girl asked me if I remembered any-

thing about taking such a packet, and about the time. That was the first that anything had been said to me about it since.

8. *Question by same.* At what time did you first see this packet, which you now say is like the one you received at the door?

Answer. I had not seen it until it was shown to me in court at this time.

The court adjourned to meet on Tuesday the 10th day of April next at eleven o'clock, A. M.

TUESDAY MORNING, APRIL 10, 1832.

Present, Brig. Gen. Wm. Peck, President. — Col. Thomas Davis; Col. Charles Lane; Lieut. Col. Abijah Ellis; Lieut. Col. Luther Eaton.

The Respondent was called and answered.

The Complainant was called and answered.

The Judge Advocate read the record of last day's proceedings.

The defence of the Respondent was read in part, by Messrs Gardiner and Dexter, and the court adjourned to meet this afternoon at half past three o'clock.

TUESDAY AFTERNOON, APRIL 10, 1832.

The court met pursuant to adjournment.

Present, Brig. Gen. Wm. Peck, President. — Col. Thomas Davis; Col. Charles Lane; Lieut. Col. Abijah Ellis; Lieut. Col. Luther Eaton.

The Respondent was called and answered.

The Complainant was called and answered.

The counsel of the Respondent concluded the reading of his defence. It is annexed and is marked (16), as follows:

(16)

MR PRESIDENT AND GENTLEMEN OF THE COURT, — The Respondent is arraigned before you to answer for certain military offences, particularly set forth in the charges and specifications of charges exhibited on the complaint of the adjutant general to his excellency the governor and commander in chief of this commonwealth, in obedience as the complaint alleges to his excellency's own orders of the 4th of January last. To the charges as specified, the Respondent has pleaded that he is not

guilty. And you, gentlemen, have severally sworn without partiality, favor, affection, prejudice or hope of reward, well and truly to try this issue. With this duty to perform, the Respondent trusts and believes that his appointed judges, though holding military offices of honorable consideration under commissions from his excellency the commander in chief, who is himself virtually the Complainant and Prosecutor in this cause, will bear in mind not only that they have been elected to the offices they hold by the citizens of a free republic, to whom they and his excellency himself are equally responsible for the faithful discharge of their respective duties, but that they stand under the solemn obligation of an oath not to be affected by the voice of authority on the one hand or of popular opinion on the other. He cannot therefore allow himself for a moment to apprehend that sworn officers, holding their commissions by the same tenure as himself, and equally liable to be called to answer for supposed military offences upon similar complaints, will suffer themselves to be swayed in their judgment by the weight of human power which is arrayed against him, or yield one title of their independence to an office or a name. He claims the right to be judged of upon the matters contained in these charges precisely as if they were preferred by any other citizens of the commonwealth. He asks you to judge as you would be judged; upon the law and the evidence applied to the issue here presented, and to render towards him such judgment as you would expect for yourselves if arraigned upon such charges and on the complaint of your immediate superior. If principles and not men in this age and country are to govern the course of judicial inquiry before military as well as civil tribunals, he fears nothing for the result. If they are not, the result to himself is too insignificant compared with its cause to be the subject of deep personal solicitude.

In discussing the case presented for consideration the Respondent hopes that he has too much self-respect, to be guilty of any breach of the just decorum due to the office of the chief magistrate of the commonwealth, at the same time that he asserts the privilege to canvass the charges and the evidence in support of them with that perfect freedom which is essential to the conduct of his defence. Whatever it would be suitable for him to say upon the subject in issue, if the Complainant were a less distinguished personage, he shall hold himself not debarred from saying because it is the governor that sues. The name of the governor is to be looked upon here, as the name of the king is

in criminal prosecutions elsewhere. It is but a name. And nothing that may be argued or asserted pertinent to the defence is to be applied as personal to the governor, any more than the criminals denial of his liability to answer on the king's indictment is personal to the king. If the governor or the king happens personally to be a party to the transactions and his own order and acts happen to be a subject of evidence, those orders and acts are to be as freely examined upon the evidence as if they were the orders and acts of a humble individual, that the court may be the better judge of their pertinency and true bearing upon the question of the guilt of the accused. So far the Respondent claims his right to go as a free citizen and soldier on trial for an alleged military offence ; if he should go beyond that line to inquire into the motives of the prosecution, or to allude to the conduct of his excellency in any matter not the subject of evidence on this trial, and should do so in a manner calculated to detract from the respectability of that high officer, he should consider himself guilty of that personal disrespect which is falsely charged against him in these specifications, and which has been falsely rumored to his disadvantage elsewhere.

Before proceeding to the examination of the charges and the evidence upon the final issue, the Respondent begs leave to refer to the previous questions which have been agitated upon this trial and to state the grounds upon which certain legal exceptions were taken and argued by the Respondent in the early stages of the cause. He excepted to the general order of the 24th December last, requiring the corps under his command to do escort duties for the government on the day of General Election upon the ground of a constitutional doubt as to the power of the governor of this Commonwealth to *exact* such services from the militia and to the effect of such kind of commands as *military orders* subjecting those who failed to comply with them, or imperfectly performed them, to military censure. He excepted also to the division orders founded upon this same general order and to the evidence of their transmission to the Respondent and receipt by him two days only before the day on which the service was to be performed, upon the ground that the law requiring him to give at least four days' notice to his company, an order to him to call out his company received two days after that time could not be binding upon him as a military order so as to subject him to military censure for any failure to comply with its terms or imperfection in the execution of the service.

These exceptions were taken, as the court is probably aware,

not for the purpose of precluding inquiry into the facts, nor for the sake of obtaining the opinion of this court upon mere questions of law ; but in order that his excellency himself, who is abundantly competent to the examination of such questions, and to whom the record of this court is finally to go for approbation or disapprobation of its judgment, might be formally required in one event, to decide upon these matters of law, and might be made fully sensible in any event of the difficulties attending such prosecutions for such causes.

And although this court has decided that the order of the 24th Dec. was a constitutional and lawful order, and that notwithstanding the irregularity of its transmission, it was still binding on the Respondent, and although those decisions are not upon the present occasion to be questioned or disturbed, yet the Respondent begs leave to suggest, as a proper subject of preliminary consideration, whether the services which have heretofore been rendered under similar orders, and the services rendered under the orders in the case, were not in fact, however they might be in theory, voluntary tributes of courtesy and respect to the chief magistrate of the state. If not, he calls upon the Prosecutor to show, he prays the court under the advice of the learned judge advocate, to consider, what means are known to the law of this land, by which the performance of such services can be compelled. Suppose the governor has a constitutional right to order out the militia at his pleasure, and that commanders of companies are bound under penalty of military censure, to notify their men to appear in pursuance of such orders, and not a man so notified chooses to appear, we ask where is the remedy? There is no remedy. There is no remedy in any case for refusal or neglect of the privates to do military duty under the laws, for the government of the militia not in actual service, but a pecuniary fine, and the statutes have not provided any fine for the case supposed. It is therefore only from pure volition on the part of the citizens, that such services have been and are performed. And the free will of the citizens will soon cease so to operate, if the officers of their choice are to be subjected to censure and degradation for accidental imperfections in the performance of such a service. Is there anything that distinguishes the obligation of the independent company of Cadets, from that of any other corps in the militia in this respect? Nothing in respect to *legal* obligation. The corps in its origin was a voluntary association of gentlemen for the purpose of affording an honorable escort to

the governor of the province of Massachusetts Bay on special occasions. It was revived after the Revolution for a like purpose ; and without any formal compact in their constitution, or any express stipulation in their charter, a tacit understanding has subsisted between the commander in chief on the one hand, and this corps, on the other, that he should ask, and they should render at his pleasure the voluntary homage of an escort of honor. But what has been the principle which has held them to this service ? Was it the principle of legal right and legal obligation ? Has it been a duty exacted in the spirit of command, and discharged in the spirit of servitude ? Or has it been an honorable tribute of courtesy and respect, which an honorable body has been found to render to a superior, and which he to whom it was rendered, has been ready to acknowledge and requite with kindness and courtesy ? The corps has uniformly been so constituted, and it must be so with every voluntary association for such a purpose, that the small pecuniary fines, whether created by statutes of the commonwealth, or the by-laws of the company for non-performance of military duty, do not, even in the cases to which they apply, constitute an effective obligation. However it may be, therefore, in the theory of the law, the duty performed by this corps has always been in fact a voluntary service. There has been no other effective obligation upon the corps, than that honorable regard to the spirit of their association, by which they have been distinguished, and proud satisfaction in discharging the duties required of them, in a manner acceptable to many successive chief magistrates, and according to the true intent and meaning of the tacit convention which has subsisted to that effect. Has it been a part of that understanding that the officers of the corps should be visited with the disgrace of military censure, or even harassed with the trouble and expense of a military trial, not for contemptuous disobedience of orders, or wilful neglect of a duty, whether imposed by law or voluntarily assumed, but for a purely accidental failure in the performance of a mere ceremony, which the utmost pains had been taken to perform with scrupulous exactness ? Yet such the Respondent trusts he shall make it appear to this honorable court, is the sole foundation of the changes which are rung upon the several charges and specifications of charges, spread upon this record. If that which has been usual and customary were to afford a just criterion for the decision of this case, the Respondent might well rely for a complete defence on the accidental failure of Col. Williams to

complete the escort service on one occasion, and of Col. Baker on another, each attended by circumstances of excuse far short of the Respondent's, and neither of which was made the subject of military trial, or even of unofficial censure by the commander in chief.

And if the performance of this service in general has been the result of voluntary alacrity to render military honor to the office and the person of the commander in chief, was it not so preëminently on the day of the last General Election, occurring for the first time at a season of the year, presenting little attraction for mere military parade? It is in evidence before the court, that neither pains nor expense were spared by the Respondent to procure a suitable escort for the government on that day. Without those personal efforts, it is in evidence before you, that on this very occasion, his excellency would have called and commanded in vain; and where, we again ask, would have been his remedy? It has been proved to you that by the fault of higher officers than the Respondent, the orders for the escort were not received in season to enable him lawfully to command the appearance of his company, that he volunteered to anticipate the receipt of those orders, in distributing notices to his men, and that the orders to him in all probability, never would have been received at all, but for the Respondent's personal exertions to obtain their transmission. It has been proved to you that not only members of the company, but others were induced by his personal solicitations to wear its uniform for that occasion, and were equipped at his personal expense. Yet the Respondent is told that he has rendered no voluntary service; that he has been wanting in common courtesy and respect to the commander in chief; and that he must be held to answer before a military tribunal for neglect of mere duty in respect to this very service.

If indeed it shall appear upon the evidence, that the Respondent has been guilty of wilfully violating any peremptory duty, or of contemptuously disregarding any positive command, or if wantonly demeaning himself, in a manner unbecoming an officer and a gentleman, he will not ask that these considerations shall avert the judgment of this court. But if the whole case of the prosecution shall turn out to be an inference by mere military fiction of disrespect to the supreme executive, arising out of an accidental omission of a part of the customary forms and ceremonies of the government on days of General Election, then these considerations, it is submitted, are entitled

to their full weight, and will enter into the merits of the defence. With these remarks the Respondent will proceed to state the principles upon which he conceives the court are bound to be governed in their examination of the case.

Several charges are preferred against the Respondent and under each of them are several specifications, or exhibitions in detail of facts supposed to support the charge and to constitute the offence.

The first principle which the Respondent would state is, that each of these specifications with the charge to which it relates, is to be distinctly considered, precisely as if it presented the whole case. It must be in itself complete and not dependent for support on any extraneous circumstance whatever. The specifications lend no support to each other ; but each one must stand or fall upon its own merits.

The first question under each will be whether the allegations it contains, supposing them to be fully proved, constitute an offence of the description charged. If they do not, the Respondent is not bound to answer it, and it matters not whether the facts it states are proved by the evidence or not. In this case the charge fails by reason of the insufficiency of the specification to support it.

If the specification however be found to be sufficient in itself, the next inquiry will be whether its material allegations are true or not according to the evidence on the record. And if in pursuing this examination it shall be found that any one fact stated in the specification which is material to support the charge is untrue, or not fully proved, the charge in this case must fail for the insufficiency of the evidence.

Nor can the evidence of any fact be admitted as tending to prove a charge which does not directly support some allegation contained in the particular specification of that charge to which the attention of the court is directed. This rule is the more material to be observed because, by agreement of the parties, and for the convenience of the court, all the evidence supposed to belong to any part of the cause has been admitted in a body, instead of first receiving the evidence to establish the first specification of the first charge, and then the evidence to establish the second specification of the same charge, and so on, according to the more regular and formal mode of proceeding. It becomes the duty therefore of the court to exercise due care and sound discretion in the application of the evidence to the several charges as specified, bearing always in mind that each

specification of charge must be considered by itself, as if it were the whole case, and that nothing in the evidence can justly affect the judgment of the court upon it, which does not tend to prove some matter which it distinctly alleges.

Another principle which should govern the whole inquiry is, that the burden of proof rests with the prosecution. It is the business of the Complainant to establish the guilt of the Respondent, and not of the Respondent to prove his innocence. It will be the duty of the court therefore, in the application of the evidence to any particular specification of charge, in the first place, to inquire whether the Complainant's evidence so far proves its material allegations to be true, as to put the Respondent upon his defence in answer to them. If such should be found to be the case, it will next be their duty to weigh the evidence offered by the Respondent to contradict or vary the state of facts shown by the Complainant, or to establish on his part matter of justification or excuse. And if upon consideration of all the evidence applicable to the particular specification of charge which is the subject of inquiry, the court shall finally be left in doubt as to the Respondent's guilt or innocence of the charge as there specified, the original burden of proof being upon the Complainant, it is the duty of the court to pronounce the Respondent not guilty of that specification of charge.

It is also competent for the court to find any part of a specification of charge to be true, although they may not find the whole of it to be true. And if such should be the case, it would be the duty of the court to pronounce the Respondent not guilty of that specification of charge, but guilty of that part of it only, which shall be proved to their satisfaction, provided that part be in itself an offence corresponding to the charge; but if it be not in itself an offence, or not an offence corresponding to the charge, it would then be the duty of the court notwithstanding the truth of the fact to find the Respondent not guilty.

These being the settled principles upon which the court are bound to conduct this examination, the Respondent will by their leave undertake to show to the court by a distinct examination of each specification of charge and of the evidence in relation to it, that he cannot lawfully be convicted upon any one of the charges as specified upon this record. And after having thus established his legal right to an acquittal under each of these specifications of charge, he will by the farther indulgence of the court upon a more general view of the whole case un-

denake to show them, that upon the broadest principles of justice and propriety he cannot be left to labor under the imputation of anything censurable in a military point of view, or otherwise, in respect to any part of his conduct and proceedings on the day of General Election.

But before taking up any particular specification of charge the Respondent asks the court to consider the general character of the charges, and what it is that the Complainant is bound to make out under them; or in other words what is the true definition of the offences which they purport to charge, and the distinctions between them.

Three distinct kinds of offence are charged. — 1st. Disobedience of Orders. 2d. Neglect of Duty. 3d. Unmilitary and unofficerlike conduct.

Under the head of Disobedience of Orders, the Complainant is bound to show a direct and positive military command, duly communicated to the Respondent, and to show that the same was formally disregarded and broken. Nothing in this respect can be implied or presumed; since the absolute order and the breach of it constitute the exact offence.

Under the head of Neglect of Duty, the Complainant is bound to show a strict military duty, either prescribed by some general regulation of the service, or growing out of the nature and character of the office held by the Respondent, or created by some special authority and direction from a superior officer having a right to create it; and that such duty being known to the Respondent was neglected.

Under the head of Unmilitary and Unofficerlike Conduct, the Complainant is bound to show some conduct of the Respondent in the execution of his military office and command, contrary to established military usage, and distinct both from disobedience of orders and neglect of duty.

These being the three descriptions of military offence for which the Respondent is on trial, let us consider how far the first of them is made out.

1st Charge. Disobedience of Orders. — The 1st Specification of this charge sets forth that a general order of 24th December was duly issued and transmitted to the Respondent, detailing his company to perform escort duties for the government on 4th January last, and ordering them to repair to the State House at noon of that day, and report for further orders; that on the said 4th January, a procession of the civil authorities was formed at the State House for the purpose of attending public

worship at the Old South, and returning thereafter to the State House as is usual and customary on days of General Election, and that the Respondent having reported that his company was present, and ready to perform the escort duties to the government as directed, *was then ordered to take up the escort thereof*, and that having so done, and having delivered the procession at the Old South, he thence departed with his company, and did not return and escort the procession back in the usual *and customary* manner, and so in disrespect, &c., *disobeyed said orders*.

The orders herein alleged to have been disobeyed in disrespect of the government are stated to have been given at the *State House* after the procession was formed, and were orders in general terms *to take up the escort* of the procession, which is said to have been formed for the purpose of attending public worship at the Old South, and returning thence to the State House.

But the charge thus specified is not supported by evidence. No proof whatever has been offered by the Prosecutor, of any order given at the State House by his excellency, relative to the movements of the Cadets. Col. Quincy, the organ through whom all orders from his excellency were communicated on that day, states no other communication from his excellency to the corps at the State House than a *request* that they would partake of a collation, he adds a *notice* to Col. Winthrop that the two houses of the legislature were organized, and an *inquiry* of Captain Sargent whether the company then drawn up in front of the State House were ready to move, neither of which communications however are stated to have been by his excellency's direction, nor do they contain anything in the nature of military orders. In addition to this deficiency of proof on the part of the Prosecutor, Capt. Sargent to whom all orders for the Respondent were given on that day, swears positively that no orders whatever were received by him at the State House purporting to come from his excellency, and in particular that no orders or instructions were issued as to the taking up of the escort, or the manner in which it was to be conducted. In respect to this specification the Respondent goes a step further, and begs leave to show to the court, that it is not only not supported by the evidence, but that it does not even support itself; it not only fails of proof to back it, but it cannot even stand alone. For the orders alleged to have been given at the State House, were simply to take up the escort, and this it is alleged the Respondent did, and that he conducted the proces-

sion to the church and there duly delivered it, and then it is set forth as a breach of the same orders, that he did not afterwards return to the church and escort the procession back, for which no order is stated to have been given; and although it is directly stated in this specification, that it was usual for the Cadets to escort the procession back, it is not averred that the Respondent was conusant of that usage, and even if it were, it would not make a case of breach of orders, though possibly it might of neglect of duty. The Respondent therefore respectfully insists that he cannot be found guilty under this specification, 1st, because it contains no charge against him; 2d, because the charge which it was probably intended to contain wholly fails of proof.

The 2d specification of the 1st charge sets forth—that a General Order of 24th Dec. was duly issued and transmitted, detailing the Respondent's company for escort duty on 4th Jan. and directing them then to report at the State House for further orders; that a procession was then and there formed for the purpose of attending public worship at the Old South meeting-house, and returning thence to the State House, as is usual and customary on Election days; and that Respondent having reported as directed, was, after the procession was formed, there ordered to take up the escort, and having so done, conducted it to the church, and was then and there *ordered to report with his company for escort duty after half an hour, yet did not report at the expiration of said half hour, nor was there with his company at that time, nor at any time thereafter ready to take up the escort, and did not escort the procession back as is usual and customary on similar occasions, and so in disrespect and contempt, knowingly and intentionally disobeyed said order.*

The essence of this charge is a wilful and contemptuous breach of orders; the order alleged to have been broken is stated to have been an order given to the Respondent at the church to report with his company for escort duty after half an hour; and the breach assigned is that he did not report at the expiration of half an hour, and was not then nor afterwards ready to take up the escort, and did not escort the procession back.

The intent of the Respondent is to be gathered only from all the facts and circumstances of the case, and as it applies equally to all the charges and to several of the specifications under each of them, and is a point of paramount importance, it will

hereafter, to avoid repetition, be once for all distinctly and fully discussed. Under the head of this particular specification the Respondent would only for the present call the attention of the court to the fact that wilful and intentional disobedience is the offence here charged, and consequently that even if the order herein set out should appear upon the evidence to have been broken, yet if it should not appear to have been wilfully and intentionally broken, but through accident, misfortune, or mere inadvertence, no judgment against the Respondent could be lawfully grounded upon this specification of charge.

The next point to which the Respondent would ask the attention of the court under this specification of charge, is that the specification itself is insufficient and does not show any order broken, owing to the indefiniteness and uncertainty of the order alleged. The order alleged is to report *after* half an hour. It would be within the terms of this order to have reported at any time however long after half an hour from the time when it was given; yet the breach assigned is that the Respondent did not report *at* the expiration of half an hour, which is not according to the terms of the order;—and although it is added that he was not ready with his company at that time, nor at any time thereafter to take up the escort, and did not escort the procession back as is usual and customary, yet it is nowhere alleged in this specification that he was ordered so to do; and therefore however the substantive matter charged might constitute a military offence, and render the Respondent liable as for neglect of duty, it could not render him liable as for breach of orders, nor justify the court, even if the matter should be fully proved, in finding the Respondent guilty under this charge and specification. But in point of proof, setting aside the question of intent, and admitting the order set forth to have been equivalent to an order to report in half an hour or thereabouts, no breach is shown upon the evidence. Col. Quincy testifies that he was charged by his excellency with an order to the company to report after one half of an hour, and that he delivered that order not to the Respondent, to whom he was bound to have delivered it as the commanding officer on duty, but to Capt. Sargent, the youngest of the four commissioned officers attached to the company. The excuse suggested for delivering the order to Capt. Sargent instead of the Respondent himself is, that Capt. Sargent was the Respondent's Adjutant or orderly through whom reports had been made by the Respondent, and other orders transmitted. But the answer does not apply to the case. It is

entirely according to military usage and etiquette, and in point of principle correct for the commander of a particular corps to make a written or a verbal report to his superior by sending to him the adjutant of the regiment, the orderly of the company, or an officer of his personal staff. And the adjutant of the Cadets is an officer of this description. The reason on which this practice is founded is that such commanding officer cannot leave his command in order to wait in person on his superior. His orderly officer therefore is charged *with* the report. He may also with propriety be sent by his commander to inquire for orders; in which particular case the commander of the corps having selected him as a suitable person to be intrusted with orders, it might be according to usage, and not incorrect in principle for the superior to transmit a written order or even possibly a verbal order through him. But where an order originally issues from the superior he invariably transmits it by one of his own staff, and it is the invariable duty of that staff officer, without exception, unless it were a case of clear necessity to deliver the order in person, especially if it be a verbal one to the commander of the particular corps for whom it is intended, and not to send it to him through one of his own staff; for by so doing the risk that the order may fail to reach the person for whom it is intended, and that it may be misdelivered or misunderstood is doubled at least; and the superior who issued the order can never know, whether it was received or rightly understood or not. The whole risk of the consequences of negligence or misunderstanding on the part of the officer of another staff to whom the order was delivered is in this case thrown upon the superior, to whom that officer is not directly accountable, by the voluntary act or omission of his own staff officer in discharging his errand. — It is no answer to say that this has been usual in sending orders to the Cadets. There is no evidence of the fact. And if it were so, it is nevertheless erroneous in principle. At any rate whenever it is done, his excellency and his excellency's staff must be content to abide by the doings of the officer of the Cadets whom they have made their agent in transmitting an order, which must be interpreted as he understood and delivered it, however erroneously, and the responsibility of the commander of the Cadets must be measured accordingly.

In the present case Capt. Sargent testifies that he reported the order as he received and understood it to the Respondent. Col. Quincy then testifies that in about one half of an hour from

the time when the order was given, he was made aware of the return of the company to the church by the sound of their music, and the officers and members of the corps and other witnesses concur in their testimony, that the Respondent did in fact return with his company at that time. The first question then that arises is, whether any further report than that was intended by the order? To have sent an officer into the body of the church; to have made a formal military report in the midst of divine service would have been indecent and indecorous in the extreme, and besides not sanctioned by that usage, which is so much relied upon in the prosecution. Col. Baker, a former commander of the Cadets, and other witnesses concur in their testimony that no such report was ever made on similar occasions, nor indeed any other report than simply a return to the church. Col. Quincy when asked how it has been usual for the company to report when ordered to report themselves at the church at or after a specified time, answers that the usual mode of reporting has been to be present at the meeting-house, and ready when the services were concluded. The inference from this would be, that it has not been usual to pay any regard at all to the particular orders, nor to make any report whatsoever at the specified time, taking reasonable care only to be present at the conclusion of the services, which may not be for hours after the time ordered for a report. According to this construction, the order to report after half an hour would have meant the same thing in the present case, as an order to report after an hour, or after an hour and a half, or after two hours. We cannot suppose this to have been the understanding of his excellency, nor was it certainly that of the Respondent. His understanding of that order was that he was to return with his company, and be ready to receive an order within a reasonable time after half an hour, and he did return, and was ready accordingly within five minutes of that time, and made report thereof by his drums in the same form in which his predecessors had always reported; having previously stationed his orderly in the church to receive an order if issued. And to report oneself on this occasion the Respondent insists, means, by established usage, neither more nor less than to be present and ready at the time named, making the fact known to the party from whom an order is expected in the way least calculated to disturb the solemnity of the exercises within. If this be the reasonable and true construction of the order according to the intent and understanding of the parties at the time, then no breach of it is shown upon the evidence,

and the Respondent cannot lawfully be found guilty under this specification of charge, even supposing it to be sufficient in substance and form, which it is not.

The 3d specification of the 1st charge is, that Respondent being under orders as set forth in the general order of 24th Dec. and having reported at the State House in obedience thereto for further orders, was *then and there ordered to take up the escort* of the procession then and there formed for the purposes stated in the first specification; and did take up the escort and conduct the procession to the Old South, and there *while marching away without leave*, received an order to *report himself in half an hour*; but did not return to the church, and report himself in half an hour as ordered, but departed and did not return, and was not ready to escort the procession back, and did not so take up the escort and perform the duties required by said orders, but left the procession to disperse or return without escort, and so in disrespect to the commander in chief, &c, disobeyed said orders. Two orders are here set forth, namely, one at the State House to take up the escort of a procession formed to attend public worship at the Old South, and thence to return to the State House, and one at the church to report himself in half an hour; and these orders are charged to have been broken.

In respect to the first the evidence is, as has been already shown in the remarks under the head of the first specification of charge to which reference is again made, that no such order, nor any other order whatever was given at the State House. In respect to the second, the evidence does not support the charge. The allegation is of an order to report himself in half an hour, that is *within* half an hour or at most at the expiration of half an hour. Col. Quincy testifies that the order communicated by him from his excellency to Capt. Sargent was that the company should report themselves *after* half an hour. Capt. Sargent testifies that the order he received was to report in *more* than half an hour, or in half an hour *and more*, and that he so communicated the order to the Respondent. Thus although these witnesses do not precisely agree in the words of the order, they do agree precisely in its effect, which is as different from the effect and in part of the order charged in the allegation as *after* is from *within*, or as *more* is from *less*; and since the question is what order was in fact given by his excellency to the Respondent, no other testimony upon this point can from the nature of the case be equivalent to that of his excellency's own

staff officer, who received the order directly from him, and the Respondent's adjutant through whom it was communicated to the Respondent, as is particularly alleged in this specification and proved by the evidence. Yet there is one piece of evidence, which the Prosecutor has thought proper to introduce, seeming to give a color to this form of specification, and which for that, as well as on other accounts, deserves particular comment. The Respondent refers to his letter of the 4th of January last, addressed to his excellency, in which it is said that "I was ordered by Lieut. Col. Quincy through my Adjutant Capt. Sargent, to report myself at the church in half an hour." The Respondent is unable to imagine any purpose for which that letter was offered in evidence unless it were to cover the form of allegation in this specification of charge. The adjutant general as the court will remember, was orally called upon to state orally the point which he expected to establish by that document in order that the Respondent might have an opportunity by the admission of the fact to exclude from the record a letter, hastily written, which he considered to be a private communication; but this the adjutant general was totally unable or totally unwilling to do. He stated no point upon which he expected it to bear: it has in fact no bearing upon any matter charged against the Respondent except as proof by way of confession, that he was ordered to report in and not after half an hour, which is contrary to the fact, as the adjutant general well knew from the testimony of his own witness as well as the Respondent's. The Respondent therefore feels himself justified in the inference, that this is an attempt on the part of the prosecution to take a petty advantage of an inadvertent and hasty expression in order to convict the Respondent of a merely formal breach of orders which never existed, and that the unwillingness of the adjutant general to state the point to which he officially offered this evidence as pertinent to the cause, arose from his own private consciousness of the impropriety of the act. Before proceeding to further remarks on this part of the case, the Respondent would inform the court that his reluctance at the offered introduction of that paper was not from any apprehension that its contents might produce an unfavorable effect upon the minds of his judges, for he believes that its effect will be far otherwise, but because it imposes on him and his counsel, the necessity which he and they would gladly have avoided of commenting on the fact as it deserves, and because the letter was not prepared with deliberation nor designed for publicity. It was written in great haste, and as it

states after a day's duty of some hardship from the intensity of the cold, and immediately after the reception of his excellency's order of arrest. Considering the great personal efforts of the Respondent, who spared neither pains nor expense to procure for the occasion of his first command a creditable escort for the government at a season of the year by no means inviting for such services, considering the severity of the exposure to which the Respondent and his associates were subjected in this service, many of them not even members of the corps under his command, but mere friendly volunteers brought out by his solicitations and efforts, without which no escort would have been had at all, considering the absolute necessity of removing the men to some place of shelter, unusual precautions which had been taken to insure a punctual attendance of the escort at the closing of the religious services, the unexpected shortening of those services towards their conclusion and the abrupt departure of his excellency from the church without a moment's pause after it was ascertained that the Cadets were not absolutely at the door, though they were close at hand, with all which the escort failed by half a minute only of exact attendance on his excellency's hasty movements, considering the mortification which had been experienced by the Respondent and his associates at this unfortunate event, the pains which had been taken to repair the misfortune as far as circumstances would permit by tendering an escort on the way, the manner in which that tender had been refused, and the sudden order for the arrest of the Respondent without any previous inquiry into the circumstances on the part of his excellency, or reasonable opportunity for explanation afforded to the Respondent, it would have demanded no great allowance for the frailty of human nature if the *private* letter to his excellency, now made public, hastily written under the first excitement of this arrest had contained some indications of a feeling inconsistent with the appearance of that perfect respect for the office of the chief magistrate of this commonwealth, which the Respondent had uniformly exhibited. Far however from this, though other faults are certainly discernible in this hasty composition, not an expression can be found in it which ingenuity could torture into evidence of disrespect.

How the rumor then should have arisen, which was most current, and may possibly have reached the ears of the court, that the Respondent had written to his excellency a *grossly insulting letter*, is a question which the Respondent leaves for the Prosecutor to answer. The letter was a sealed letter from

the Respondent to the governor, and was handed by the governor the second day after its date, to the adjutant general as that officer testifies. The rumor of its contents, especially that it were of a grossly insulting character, it will be readily believed, did not come from the Respondent himself, and it therefore lies with the adjutant general, as being both the Complainant in this cause, and the official representative of his excellency here, and the actual keeper of the letter, to say whether it came from the governor or from himself. If the inquiry as to the origin of this rumor is not answered, the Respondent is at liberty to fix it where he will. The letter is as far from being an insult certainly, as it is from an apology, which latter it was neither the intention, nor the duty, nor the right of the Respondent, as he conceives, to offer after his arrest. His excellency without granting to the Respondent a reasonable time to express in suitable form, as he was about to do, his unfeigned regret and deep mortification at the event of the day, had seen fit to order a court martial; it was the duty of the Respondent, as an officer, to submit; it was his right, as an individual, to be heard in his defence, and the single object of the letter was to make his excellency aware of some of the most material facts which constituted that defence. The injury to the Respondent by the arrest had been done, as the letter expresses, and could not then be remedied: the Respondent had been deprived of his sword and suspended from his command; he was ordered to answer for a military offence before an "organized court martial." That tribunal was to judge whether he had been guilty of breach of orders or neglect of duty under the circumstances of the case; in the meantime, it was proper that his excellency should not proceed in ignorance of the facts; but it was no time for the Respondent to sue for favors, supplicate forgiveness, or express contrition. The Respondent at that time, it is submitted, had no right to tender an apology, if he had then been so disposed, because an apology must have been in behalf of his corps, as well as of himself, and consequently must have been in the nature of an official communication by him, as commander of that corps, which he ceased to be at the moment of his arrest. And although the adjutant general to the question, whether it is according to military usage for a superior officer to receive as official, any communication from an officer, whom he has put under arrest, is constrained to answer that he does not know, it is too apparent to be the subject of testimony, that an arrested officer cannot make an official communication du-

ing his arrest. The letter purports to come, not from the commander, but from the *late* commander of the independent company of Cadets. It is a communication from the Respondent, not as an officer, but as an individual; and being a mere private channel of information to the governor, is as much out of place on the records of this court, as evidence in a public prosecution, as it was upon the "controversial file" in the office of the military department of state. For its position *there*, the adjutant general states upon oath, that he had the special direction of his excellency, who, however, in matters of military usage and etiquette, must be supposed to act by the advice of his military staff; for its position *here* the Prosecutor has not offered the same excuse. But without asking the court to inquire with what degree of propriety a private letter is thus used, being in the case its effect is to be considered; and if it be relied upon as evidence in behalf of the prosecution under this specification of charge, that the Respondent was ordered to report at the church in half an hour, contrary to the fact, as proved by the only witness competent to prove it in behalf of the government, it carries the answer to the charge with it; for the same letter states that the Respondent *did* report in half an hour; and the rule of evidence in respect to a confession is, that the whole supposed confession shall be taken together according to its natural import, and it is not competent for the party attempting to use his adversary's confession to select that part only, which suits his purpose, and reject the rest. If it be received as evidence therefore, of sufficient weight to control the testimony of the witnesses as to the time when the Respondent was ordered to report, it is also evidence of equal weight to establish the fact, that he did report accordingly, and consequently, the Respondent cannot lawfully be convicted of breach of order upon this evidence. Or if the letter is not received as evidence to control the testimony of the witnesses on this point, since that testimony proves that no such order was given as is herein specified, the same result ensues. The Prosecutor is at liberty therefore, to choose between the horns of this dilemma. In either event the Respondent cannot be found guilty under this specification of charge.

2d Charge — Neglect of duty. — The 1st specification sets forth, that the general order of Dec. 24th, was duly issued and transmitted, ordering the Cadets to perform escort duties for the government on the day of General Election, and to repair to the State House at noon of that day, and then report

for further orders ; that a procession of the civil authorities was formed at the State House on that day, for the purpose of attending public worship at the Old South, and returning thence to the State House, as is usual and customary, and that the Respondent having reported as directed in the general order, was ordered to take up the escort of the procession, *whereby it became his duty to escort the government to the Old South, and then to have waited until the services were over, and then to have taken up the escort again with the usual and customary honors, and to have conducted the same (quære, whether the procession or the escort,) to the State House, and there to have waited until he was discharged from further duty or received further orders ; of all which he was conusant ; yet, having delivered the procession at the Old South, he departed without leave, and was not present when the services were over, and did not receive the procession with usual and customary honors, nor escort it back, as was his duty, but left it to return without escort, and so knowingly and intentionally wholly neglected his duty in that respect.* The substance of the charge here, is a *wilful and intentional neglect of duty.* The duty alleged is to have escorted the procession to the church, there to have waited during the services, and thence to have escorted the procession back. This duty is stated to have arisen from the matter previously set forth ; namely, the general order of Dec. 24th, detailing the Cadets for escort duty on that day ; the fact that a procession was then formed for the purpose of going to, remaining at, and returning from, the church as was usual and customary ; and an order at the State House to take up the escort. And the neglect of this duty is stated to consist in a departure from the church without leave, not being present at the conclusion of the services, and not escorting the procession back. This specification is both insufficient in itself, and unsupported by proof.

1st. It is insufficient in itself, because it cannot be necessarily inferred from the matters contained in it, that the Respondent was under a military duty to do what it complains was not done, namely, to wait at the church during service, and escort the procession back. This cannot be gathered certainly from the general order of Dec. 24th, which, as set forth in the specification, only ordered the Respondent to do escort duties for the government on the 4th Jan. in general terms without defining what those duties were to be ; the particular order contained in it as set forth, was to repair to the State House at noon of

that day and report for further orders; and this the specification itself admits that he did. He then reported for further orders as it appears, and from those further orders he was to learn what further duty he was to perform. The further order set forth is that he was to take up the escort of the procession then formed; and it is alleged that he did so, and that he delivered it at the church. It cannot be inferred therefore from this order, any more than from the general order of Dec. 24, that he had not done all the duty required of him. It is true that the fact is also stated that a procession of the civil authorities was formed on that day at the State House for the purpose of going to the Old South, attending public worship there, and returning thence to the State House, as was usual and customary. But it does not follow at all from that, that it was the duty of the escort to do the like, nor is it so alleged. It is averred that it was usual and customary for the civil authorities not only to go to the Old South, but to attend public worship there, and to return to the State House; but it is nowhere alleged in this specification, that it was usual and customary for them to have a military escort, or that it was usual and customary for the same corps, which had escorted them to the church to remain there during service, and escort them back. It cannot be inferred therefore, either from the general order of Dec. 24th, or from the particular order at the State House, or from the nature and purpose of the procession as described in this specification, nor from all these allegations taken together, that it was strictly speaking a duty on the part of the Respondent to remain with his company, and escort the procession back. Yet these are all the circumstances alleged from which the duty is supposed to have arisen. And these being insufficient to create the supposed duty, the Respondent cannot be found guilty for neglect of it, even if the fact stated should be found upon the evidence to be true. 2d. Their specification is not supported by proof. The sources from which the duty is supposed to be derived are above stated. The first of them, namely the order of Dec. 24th, is proved to have been issued, proved not to have been *duly* transmitted, but proved to have been finally received by the Respondent. This order as before remarked creates no particular duty, except to report with the company at the State House at noon of the 4th of Jan. for further orders, which it is proved the Respondent did. The fact that the civil authorities had formed a procession on that day for the purpose of going to the church, attending divine service, and returning

to the State House, is sufficiently proved; and that this had been usual and customary, if not sufficiently proved, the Respondent is nevertheless content to admit. But, as before remarked, the mere fact that such a procession had been formed, has in itself no tendency to prove that the Respondent was under a duty to escort it, and to give it that effect, it becomes necessary that it should be coupled with some other circumstance. The circumstance alleged for this purpose is an order to the Respondent at the State House to take up the escort, which allegation is disproved upon the evidence, as has been shown in the remarks under the 1st specification of the 1st charge. There was no such order; consequently the supposed duty wholly fails of proof. Nor is the case aided by any proof of usage and custom which may be in the case. The argument in behalf of the prosecution on that point would probably be, that since it had been usual and customary for the Cadets to escort the governments on Election day both to and from the church, the general orders of Dec. 24, detailing the Cadets for escort duty on the 4th Jan. coupled with the facts, that the Respondent had appeared with his company and reported pursuant to those orders, that a procession of the civil authorities was formed, and that the Respondent did escort them to the church, created a duty on his part to escort them back; or, in other words, that by reason of the usage and custom, the general orders for the Cadets to do escort duty on that day were equivalent to particular orders to escort the government both to and from the church, and superseded the necessity of such orders. But however sound that argument might be upon the evidence disconnected from the allegations of the charge, the evidence itself upon which the conclusion ultimately rests, cannot be applied to this specification. For the sole foundation of this view of the case is the fact that it had been usual and customary for the Cadets to do the whole duty supposed; which fact cannot be proved under this specification, because no such fact is therein alleged, and the common rule of law is that nothing shall be admissible as evidence against a defendant, which is not either specifically set forth, or necessarily included in some of the allegations against him. Although the Respondent admits therefore that there is such evidence before the court, yet he insists that it cannot be lawfully applied to the support of this particular specification of charge, however it may bear upon the others. Then how stands this charge upon the evidence? The alleged duty of escorting the government to the church is proved by

numerous witnesses to have been performed, and is in fact admitted in the specification. The alleged duty of waiting at the church until the services were over is disproved; for no evidence is offered by the prosecution tending to prove it, and it appears from the records of the company, and other evidence, that it has never been done on former occasions. The evidence of the alleged duty to escort the procession back rests wholly upon a usage, which is not alleged, and the evidence of which is therefore inapplicable to this specification.

Departing from the meeting-house without leave, which is herein alleged, after having reported for escort duty, and taken up the escort, may be considered perhaps in itself as a substantive charge of neglect of duty; but this wholly fails upon the proof. The only witness to the fact on the part of the prosecutor is Col. Quincy, who states that when he went out from the church to communicate with the Respondent, he saw him marching away with his company before he had had any permission to do so. But this is wholly rebutted by the testimony of Capt. Sargent, and Theodore O. Thatcher, who concur in stating that the company moved only a few paces from the door of the church, and came to a halt. At this halt the permission to leave the church, implied in the order to report after half an hour was communicated to the Respondent by Capt. Sargent who had received it from Col. Quincy, and upon learning it the Respondent marched away with his company. Capt. Sargent testifies expressly that the object of the movement, which Col. Quincy saw begun, but did not wait to see the end of, was not to march away from the church, but to move out of the deep snow in which the company were standing before the door of the meeting-house, to a place a few paces below from which the snow had been somewhat cleared. There is nothing therefore in this specification, which, whether viewed upon its own sufficiency, or upon the sufficiency of the proof in support of it, would justify the court in finding the Respondent guilty under it, even laying aside for the present the question of intent. But since the very point of the charge in this specification is, intentional neglect, that fact must be abundantly made out to the satisfaction of the court; and even if all the other facts stated should be found true, yet if the court should not see good and sufficient cause to believe the neglect intentional, they would upon that ground alone be bound to find the Respondent not guilty of this specification of charge. For the present the Respondent again leaves the question of intent with

the remark, that failure upon that point is fatal to the prosecution. The 2d specification of this 2d charge is, that a general order of 24th Dec. was duly issued and transmitted, ordering the Cadets *to perform escort duties for the government* on Election day, and to repair to the State House at noon of that day, and *report for further orders*; that a *procession* was then and there *formed for the purpose of attending public worship* at the Old South, and *returning thereafter to the State House as is usual and customary*; that Respondent having reported that his company was present, and ready to perform the escort duties to the government, as in said general orders directed, was after the procession was formed, ordered to take up the escort thereof, and having so done, conducted it to the church, and was then and there *further ordered to be ready with his company to report himself for escort duty after half an hour, whereby it became his duty to have been present, at the church at the expiration of said half hour, and reported, and there to have waited* until the services were over, and to *have then received the procession with usual and customary honors, and to have conducted it to the State House and there delivered it* in a military manner. Yet the Respondent *without leave marched off* and afterwards returned before the services were ended, and *without reporting and without leave* soon marched away again, and *was not present to receive an order sent to him to take up the escort, and did not receive the procession when it was ready, nor escort the same back*; and so in disrespect, &c, *knowingly and intentionally* neglected his duty.

Here again the essence of the charge is *wilful and intentional neglect*, and all the circumstances and facts alleged in the specification are set forth as leading to that consequence expressed in the conclusion. The Respondent as before, refers to his separate consideration of that point hereafter; repeating that if all the facts and circumstances set forth were proved as alleged, they would be utterly worthless to support this specification of charge, unless the court should be also satisfied, that the neglect complained of, was intentional. Passing by this consideration we find it alleged to have been the *duty* of the Respondent to have been present at the church at the expiration of half an hour from the delivery of the procession there, and to have reported, and to have waited to the end of the service, and then to have received the procession with customary honors, and to have escorted it back to the State House, and this duty is alleged to have arisen from the other facts and circumstances

previously set forth, namely, the general order of 24th Dec. The formation of a civil procession at the State House, for the purpose of worshipping at the Old South and returning; the order to the Respondent at the State House to take up the escort of this procession; and the further order at the church *to be ready with his company to report himself for escort duty after half an hour.* The circumstances from which the duty is supposed to have arisen, with the exception of the last mentioned order at the church, have been already considered under the head of the 1st specification of this 2d charge, to which the Respondent again refers, and have been shown it is believed to be insufficient, if proved to create the supposed duty. The only circumstance therefore, now to be considered, from which the supposed duty could have arisen is the alleged order at the Old South to be ready to report for escort duty after half an hour, and the inquiries are, 1st, how far this allegation is supported by the proof; 2d, how far the supposed duty as set forth, follows from this order; 3d, how far it has been neglected; 4th, whether intentionally neglected or not. 1st. Is it proved that the Respondent was ordered to be ready with his company, to report himself for escort duty after half an hour? The order as testified by Col. Quincy was, not that the Respondent should be ready with his company to report, but that the company should actually report for escort duty after half an hour; and the breach of this order as testified by the same witness, in answer to the first question of the Prosecutor is, that the company did not report itself to his knowledge after half an hour, nor at any other time at the church; although he elsewhere states that he was aware of the return of the company to the church in about half an hour, by hearing their drums, which appears by the evidence to have been the only usual mode of reporting on such occasions. Capt. Sargent's testimony varies the evidence essentially in its application to the present charge, not by any material contradiction of Col. Quincy's testimony, but by supplying an important omission. The order received by him, he states, was that the company should report themselves again in more than half an hour, or in half an hour and more; and that Col. Quincy added that when they reported, he would either be out himself, or send out and give us further orders. Col. Quincy it is true, denies this statement; he says he is sure that he said nothing concerning being at the door, or receiving a report from Capt. Sargent at the end of half an hour; and in lieu of it, he thinks he added a suggestion or caution to Capt.

Sargent, to be at the church at the conclusion of the services. Capt. Sargent is equally confident that there was no such suggestion as that from Col. Quincy, but that he directed him to report after half an hour, and said he would either be out, or send out further orders. The two witnesses are utterly at variance in this particular; which of them then is best entitled to credit? Col. Quincy assigns as a reason for his confidence in this respect, that he knew from the situation he always occupied in the church, that it would be impossible for him to have any communication with the company, without disturbing the whole congregation. And when asked whether he could not have sent out a message by one of the constables in attendance, he says he thinks he could not; that he sat in the immediate vicinity of the pulpit, and could not speak to a person in that situation without attracting the attention of the audience. The court will judge of the weight of this objection, and consider whether a whisper to a constable would so far have attracted the attention of the audience, as to have disturbed the whole congregation. It has been done on other occasions, at least, without that effect. Still farther to bolster up the accuracy of his recollections, this witness states, that immediately after the return to the council chamber, he made a memorandum of the words he had used in giving the order, from which he testified. The court will judge also, how far the time and circumstances under which this memorandum was made, while the event of the day was under discussion in the council chamber, an arrest resolved on, and a case to be made out to support it, entitle it to peculiar weight. On the other hand, Capt. Sargent testifies that he repeated the order as he understood it, and as he now states it, *immediately* after it was received, to the Respondent at the halt just below the church, and again at the Exchange. He repeated it the following morning to Mr Thatcher and others, and has, he says, repeated it at different times to a hundred persons. He repeated it within a day or two, to one of the council of the Respondent, who took down the statement in writing, which is in the case, and corresponds precisely in the matter of dispute with the witness' testimony before the court. His testimony is the more material, because through him and by him the order was conveyed to the Respondent, so that what Capt. Sargent understood, and not what Col. Quincy understood to be the import of the order, is to be assumed as the basis of information on which the Respondent acted. Since Col. Quincy chose to select an agent for the communication of the order,

instead of communicating it directly to the Respondent himself, he makes himself and his excellency responsible, as was before remarked, for any error of that agent, and the Respondent is to be judged according to the order as he received it, and not according to the order as it was originally issued. The real question therefore, is, not what the order delivered to Capt. Sargent in fact was, but whether he is sufficiently accurate to be believed in his present recollection of the order as he delivered it to the Respondent. Though if the question were, what the original order was, the Respondent insists, that the testimony of Col. Quincy, who is contradicted by so many witnesses in so many particulars, cannot be entitled to equal credit with that of Capt. Sargent, who is contradicted by no other witnesses in the case. That the understanding of the Respondent at the time was according to Capt. Sargent's present impression of *his* understanding of the order, is proved beyond question by collateral testimony, showing that the Respondent acted in conformity with that understanding; for both Capt. Sargent and Orderly Sergeant Murdock, concur in testifying, that some time before the half hour had elapsed, the latter was sent to the Old South with orders to remain there, until he should receive an order from Col. Quincy. And it farther appears by the uncontradicted testimony of several witnesses, that after Sergeant Murdock had been absent some time, and the half hour had more than expired by some minutes, the company was marched up to the meeting-house, under an apprehension that some accident might have prevented the return of Sergeant Murdock, or that he might have misunderstood his instructions. The conversation which took place between Capt. Sargent and the Orderly in the porch of the meeting-house, consisted in the first place of an inquiry, why the latter had delayed so long, and an answer that he had received no order from Col. Quincy. And the company was kept drawn up in front of the meeting-house, in expectation of such an order, until it became absolutely necessary to move them from the severity of the cold. The inference therefore from the whole body of testimony is irresistible, that the order communicated to the Respondent, was not that he should hold himself in readiness to take up the escort at any time after half an hour, but that he should report for further orders in something more than half an hour; a variance so material that it must be fatal to this specification. 2d. We may, however, proceed to the second inquiry, namely, how far the supposed duty follows from

the order proved, that duty being according to the allegation, to have been at the church in half an hour, to have then and there reported, and to have waited there till the services were over, and then to have received and escorted the procession. The Respondent respectfully insists, that no such duty arose from the order conveyed to him. The order was, you will report yourselves here in half an hour and more, and I will come out or send out and give you further orders. These can be considered in no other light than as discretionary orders, in respect to the time at which the company were to report themselves at the church. To report yourself in half an hour and more, means such time after half an hour as you shall judge suitable for the occasion and duty to be performed. No other reasonable construction can be put upon an order so exceedingly vague and indefinite as to report in half an hour *and more*, as testified by Capt. Sargent, or to report *after* one half an hour, as testified by Col. Quincy, and there is nothing to choose in this respect between the two forms of expression. Well might Capt. Sargent have called for a repetition of such an order to be sure that he heard aright, and well might the Respondent and Capt. Sargent have expressed together their doubts as to its meaning. The duty created by it, at most, was to have reported in such reasonable time, after half an hour, as the Respondent shall judge sufficient. Having done so, was it his duty from anything proved under this specification to have waited at the church until the services were over, and then to have received and escorted the procession back to the State House? Clearly not; for when he reported, he was to have further orders; by those further orders was to be determined the further duty he was to perform; and in default of such orders, his further conduct as an officer was left as it was before, wholly at his discretion. 3d. Then has there been any neglect of duty under this specification? We have seen that the whole duty was, that the Respondent should cause the company to report themselves in such time after half an hour, as he should judge proper. And what is the evidence? It is that in a few minutes after half an hour the company did report themselves in the usual manner at the church, and that even before that time an officer was sent to the church from abundant caution lest an order should be issued before the arrival of the company. Will it be contended that the Respondent was bound to have reported in any other form? Col. Quincy testifies that he knew of the arrival of the company, and the whole assembly

in the meeting-house knew it by the sound of their drums. The Respondent knew that they were aware of it, because his own orderly, who was within the meeting-house; was brought out by that notice. And the evidence on all hands is, that no other form of report than this had been usual and customary. It was then the duty of Col. Quincy according to his engagement, to have procured from his excellency a further order for the Respondent; and the Respondent waited for such order a reasonable time, from 5 to 15 minutes, as is variously stated by the different witnesses, his men being drawn up under arms in intensely freezing weather; weather in which, according to the testimony of the medical witnesses, it would have been hazardous of life to have kept them much longer so exposed; and when much suffering at the time, and some consequent illness in two cases at least, the cases of Thompson and Oliver, were effects even of this short exposure. The Respondent was under no duty to wait, he was under a most imperative duty to remove the men under his charge. To argue that it was his duty to have waited an hour and a half until the services were closed, is in effect to say that it was his duty as a provident and discreet officer, under no express order, to have kept his men standing until they were frozen to statues, lest it should possibly happen that his excellency should send an order at some moment, when he and his company were not exactly at the door. If this was not his duty, then it follows that the residue of his service was wholly discretionary; and if in the exercise of that discretion, ordinary and reasonable precautions were taken to be at hand, when the procession should be in readiness to move, he cannot be deemed guilty of neglect of duty, even if those precautions should accidentally have failed of their intended effect. And this would naturally bring us to the 4th inquiry under this specification, namely, whether there was any wilful and intentional neglect of duty on the part of the Respondent; which, as before remarked, is to be the subject of a distinct future consideration. In the meantime the Respondent insists, that apart from that consideration, he cannot lawfully be found guilty under this specification of charge, because it appears upon the evidence, that it was not his duty, as is herein alleged, to have been present at the church at the expiration of one half hour after his dismissal therefrom, nor at any time sooner than he was present thereat; because it was not his duty to have caused his company to report themselves at the church otherwise than they did; because it was not his duty to have waited at the

church until the services were over, nor longer than he did wait, at the hazard of the lives of his men, for orders promised to have been issued immediately upon his return ; and because it was not his duty to have received the procession after the services were over, with usual and customary honors, and to have conducted it to the State House, and there to have delivered it in a military manner, having no orders so to do, and having waited a reasonable time under the circumstances for such orders. The charge contained in this specification, of marching away without leave, has already been sufficiently commented on under the preceding specification, and is wholly disproved by the evidence.

The 3d specification of the 2d charge is, that a general order of Dec. 24th was duly issued and transmitted, ordering the Cadets to perform escort duties for the government on the 4th of Jan. and directing them to report at the State House at noon of that day for further orders ; that a procession of the civil authorities was formed on that day for the purpose of attending public worship at the Old South and returning thereafter to the State House as is usual and customary, and was ordered to take up the escort thereof, and having conducted the same to the Old South was further ordered *to be ready with his company to report himself for escort duty in half an hour* ; whereby it became the duty of the Respondent *to have been at the meeting-house with his company in half an hour, and reported, and there to have waited* until the services were over, and to have received the procession with usual and customary honors, and to have conducted it back to the State House &c. Yet the Respondent *marched off without leave*, and returned, *and without reporting marched away again, and was not present to receive an order* to take up the escort, and did not receive the procession and escort it back ; and so *in disrespect, &c, knowingly and intentionally* neglected his duty.

Two circumstances distinguish this specification from the last, and one of them distinguishes it above all the other specifications of all the charges brought against the Respondent. It is that it alleges the duty of the Respondent to have arisen from an order to the procession of the executive and legislative branches of the government to escort itself ! It avers that a procession was formed, and was ordered to take up the escort, and having conducted the same to the Old South, was ordered to report in half an hour : whereby it became the duty of the Respondent to have been present at the meeting-house, and reported, and to have waited

&c. The order in fact given, as it stands upon the evidence, to report *after* half an hour, or in half an hour *and more*, is sufficiently vague and indeterminate, and somewhat difficult to be broken; but it seems to be going a step too far to attempt to charge the Respondent with neglect of duty, because the executive and legislative branches of the government would not obey an order to escort themselves. Supposing it however to have been the intention of the framer of this specification to have alleged that the *Respondent* was ordered to take up the escort, the only other circumstance, which distinguishes this from the next preceding specification, is the averment that the Respondent was ordered at the meeting-house to be ready with his company for escort *in* half an hour, instead of *after* half an hour. Upon this point reference is made to the remarks under the 3d specification of the 1st charge, where the evidence is considered as to the language of the order in fact given; and upon this, as well as all other points applicable to the charge as here specified, reference is also made to the remarks immediately above, under the next preceding specification of charge. For the reasons there given, as well as because this specification is so informally drawn, as to be totally unintelligible and unmeaning, the Respondent insists that he cannot be lawfully found guilty of anything under it. It must not however be forgotten that the main purpose of this specification, so far as it can be guessed from its language, is, like the other specifications under the charge of neglect of duty, to present a case of wilful and intentional neglect, for which only the Respondent is called to answer, and which he will take occasion to answer in full in the course of his defence.

The 3d charge is for unmilitary and unofficerlike conduct, and the first specification of that charge is, that a general order of 24th Dec. was duly issued and transmitted, ordering the Cadets to perform escort duties for the government on the day of General Election, and directing them to repair to the State House at noon of that day, and report for further orders; that Respondent did report in obedience thereto, and for said purposes and for further orders in relation thereto, and did in obedience to the further orders there received, take up the escort of the government formed in procession for the purpose of going to the Old South, to attend public worship, as is usual and customary, and of returning to the State House; of all which he was conusant; and did escort to the meeting-house, and there delivered the said procession, and *then without leave*

or authority so to do, gave orders to his company to march away, and while on the march away received another order to report himself at the meeting-house with his company for escort duty after half an hour, and afterwards returned and halting a short time, but without reporting or receiving permission to go away or leaving behind an officer to give information where he went, so that an order could be communicated, marched off again, and after again returning and halting, but without reporting, or receiving permission so to do, and without leaving an officer behind, marched off again, and did not return in season to take up the escort, and was not present to receive an order for that purpose ; by reason of all which, the commander in chief, &c, left the meeting-house without being received and saluted and escorted back, &c ; all which conduct is unmilitary and unofficerlike, and contrary to the rules of military etiquette and propriety, and unbecoming an officer of his rank and station. The facts here relied upon as constituting unmilitary and unofficerlike conduct, were 1st, marching away from the meeting-house without leave or authority, which, as already remarked, is disproved by the testimony of the officers of the company, since that testimony establishes the fact, that the company moved only about its own length from the door for a particular purpose, and halted until the order from his excellency was communicated to the Respondent. 2d, not reporting after half an hour. This also has been shown to be unsupported by the evidence, unless the Prosecutor proposes to insist on some other form of report than that which has always been usual and customary on such occasions, which would be somewhat inconsistent with a charge relying mainly upon usage and custom. 3d, marching away again, and returning, and again marching away without leave. This as has been shown upon the evidence the Respondent had not only a right, but was bound to do for the preservation of his men, no further orders being issued to him as had been promised. 4th, not leaving behind an officer to give information where he went. And why should he ? He had left an officer to receive an order, until after the half hour had expired. He received none, and was left to be governed by his own discretion as to his further movements. It would have been one mode of exercising that discretion, perfectly military, doubtless, and officerlike, to have left an officer at the church to give notice, where he might be found. Was it not also military and officerlike, and was it in truth less discreet to employ several special messengers, as it appears he did, to bring him instant notice when

his services were about to be required? Is it a just matter of complaint, that he did not leave word where he might be sent for, when he took means to receive without fail such early notice of an approaching occasion for his services, that he need not be sent for? Besides which, it appears that he did leave means of information behind him, in addition to the special messengers employed to bring him notice, for the constables on duty generally knew the place to which he had withdrawn his men; and farther than that, one at least of his excellency's staff had been informed, as Major Inches testifies, on the preceding Sunday, that the quarters of the company would be at the Exchange Coffee House, "as was usual and customary on days of General Election," of all which the adjutant general must be presumed to have been conusant. 5th, not returning in season to take up the escort, and not being present to receive an order therefor. If it was military and officerlike in the Respondent to have removed the men under his command from hazardous exposure, and to have taken the means which he did take to insure a seasonable notice of the time when his presence would be required, then how is it imputable to him as unmilitary and un-officerlike conduct, that he did not happen to be on the spot at the instant his excellency moved? Had he any orders to do otherwise than he did? It must be admitted that he had not. Could he have prudently remained with his men under arms in front of the meeting-house? The testimony is conclusive that he could not. Should he have carried his men into the meeting-house? It was too late for that election in the midst of divine service, and when the house was fully occupied. Was there any nearer place where his men could have been drawn up under shelter than that which he selected? None such is shown. Was that sufficiently near for a seasonable notice and arrival on his part, under any state of circumstances, which could be foreseen? The concurrent testimony of Mr Mann and Mr Braman and others must be conclusive upon this point. Was the time at which the messengers were directed to leave the meeting-house seasonable under ordinary circumstances, and the information which the Respondent had? The time fixed was the closing of the sermon, the information under which he acted, was that a prayer and an anthem would follow. Was three, four or five minutes an unreasonable time to allow for those services? The testimony of Daniel Parkman, Esq. is most satisfactory to show, that from fifteen to twenty minutes would have been no more than a usual allowance, and it is cor-

roborated by other testimony in the case. Was there any unfaithfulness on the part of the agents employed to give notice? Braman testifies that he left the meeting-house just as the clergyman was about closing his sermon, and ran all the way to the Exchange Coffee House, and gave notice to the Respondent without delay. Mann testifies that he also left before the clergyman had quite finished, and ran all the way, intending to give notice, but met Braman at the Exchange Coffee House, and learnt that the notice was already given? Was there any unreadiness on the part of the Respondent to receive notice? The officers and privates of the company, and the musicians hired for the day, all concur in testifying that the men stood drawn up under arms, with orders that not a man should quit the ranks, and it appears that two or three only, without the knowledge of the Respondent, had quitted their posts and gone into another room. Was there any delay or tardiness in moving after notice was received? Braman testifies, that when he gave the notice, the Respondent immediately ordered, "Attention! Shoulder arms." Mr Braman did not see them move, because he immediately left the room to return to the meeting-house. But both he and Mr Mann testify, that they heard the music of the company commencing their march, as they left the house. The officers and members of the company testify, that they moved without a minute's delay. Simpson testifies to the same fact, and that they marched in an accelerated quick time, but little short of double quick at the tap of the drum. Was it then owing to any unmilitary and unofficerlike conduct on the part of the Respondent, or to what accidental circumstance was it owing, that he failed to be present and ready to receive the escort? It is in proof that instead of 10, 15 or 20 minutes being occupied, as was to have been expected, in the concluding services, they were either wholly omitted, or hurried into the space of one or two minutes at most. It does not appear that any anthem was sung, and it does appear that the usual prayer was turned into a brief benediction.

All the witnesses who testify at all to this point agree, that these services were unusually shortened; and it is proved beyond the possibility of doubt, that within four or five minutes at most, from the conclusion of the sermon, the Cadets were at the door, while his excellency was some little distance beyond the corner of Washington and Milk Streets, moving with a rapidity suited to the temperature of the day, rather than the solemnity of the occasion. The Respondent confidently says, that this

short lapse of time between the conclusion, not of all the services, but of the sermon and the arrival of the Cadets, is proved beyond the possibility of doubt, and as it is a point of some importance to this cause, he begs leave to collate and compare the testimony upon it. In the first place, he would remark, that in nothing is a mere judgment or opinion so liable to error as in respect to lapse of time ; and still more liable to error is the recollection after some considerable interval of the judgment or opinion once formed. Consequently there is no subject of judicial inquiry in respect to which so much discrepancy is usually found among witnesses ; and it is rather remarkable that the witnesses in the present case so nearly agree, than that they differ as they do. He who has nothing to do but to wait, especially if he wait with some anxiety, or impatience, thinks every moment an age. He, on the other hand, whose whole attention is fixed on a pursuit, imagines hours to be brief minutes. Men differ therefore in their original estimates of the lapse of time during the happening of a particular event, according to accidental circumstances ; and from other circumstances they differ yet more in their subsequent recollections of it. In comparing judgments and opinions in this respect, therefore, all the circumstances likely to have affected the estimates of the several witnesses should be carefully borne in mind. But if we can fix upon a single fact furnishing a measure of time, it is better evidence than a hundred opinions under whatever circumstances formed. Thus, if we can learn what was actually done, between the happening of two events, by persons who were the whole time in action, it furnishes a far more accurate measure of the interval of time between the two events, than any number of judgments or opinions of witnesses variously circumstanced possibly can ; for the time necessary to perform the same action again, can always be ascertained by actual experiment. In fact, motion in some form or other is the only measure of time which the ingenuity of man has yet invented. With these principles in mind, let the testimony be examined. Col. Quincy thinks that it might have been 10 or 15 minutes, 10 certainly, after the completion of the services in the church before his excellency moved. He thinks that he himself was 10 minutes standing at the door of the meeting-house inquiring for or sending after the Cadets. But he was waiting, and waiting with some anxiety, conscious that his excellency and the other members of the civil procession were waiting also, somewhat impatiently perhaps after a service of

unusual length, and at an hour of the day when few men wait with entire serenity, notwithstanding the poet may have libelled humanity, when he sung, how "wretches hang that jury men may dine." Col. Quincy was not only waiting under these grave considerations, but waiting at the outside door of a meeting-house with the thermometer down to zero. The court must be aware that a very little time under these circumstances suffices to make a great show. But how was it with the constables. Happy men! They had no solicitude about the affairs of state, and were little liable to be afflicted with anxiety, as to the event of the procession's having or not having a military escort; they too were waiting, but their waiting is a part of their regular vocation; they were paid for it, and might as well be waiting there as elsewhere, especially as they were under a comfortable shelter, and had doubtless dined at a suitable hour. Consequently they make a pretty short estimate of time. Mr Robinson says, that before the sermon was quite closed, Braman went to call the company, and that he followed Braman to the door — that directly after he returned into the porch and found the organ had begun to play; that immediately upon that Col. Quincy came out, and inquired for the company — that he staid there a minute or two, not more, and then returned into the church — and Col. Quincy himself testifies that immediately upon his return the governor left the church without an instant's delay. Mr Reed, another constable, testifies, that shortly after the services were ended, Col. Quincy went out, and that in a minute or half a minute after the governor told the witness to call Col. Quincy back, saying it was no matter; that he did so, and the governor immediately left the church. Thus the 10 minutes that Col. Quincy thinks he must have passed at the door of the church is reduced in the opinion of one of the constables to two minutes at most, and in the opinion of the other to one minute, or half a minute. Mr Clark, the musician, whose avocation ought to lead him to be an accurate observer of time, was moved by the interest of curiosity, but not probably of great solicitude, and certainly with no feeling of responsibility in the matter, to walk down to the Mansion House in Milk Street as soon as he perceived the services were over, for the purpose of seeing where the Cadets were. He walked as fast as he could to that point, and then turning to the church saw Col. Quincy at the meeting-house door; from that time until he heard the drum of the company, he estimates to have been half a minute; and from the time he first saw Col. Quincy

at the door, until he saw the governor come out, he estimates to have been not a minute; and while the governor and suite were yet in sight, moving towards the head of the street, the Cadets were also in the sight of the witness marching up towards the meeting-house. His testimony is composed partly of estimates of time, and partly also of facts which enable us to form an estimate for ourselves. He began to walk toward the Mansion House the moment he saw persons coming out of the church, he walked as fast as he could; and the Mansion House is not half a minute's walk from the Old South; as soon as he got there he saw Col. Quincy at the door, and almost at the same time heard the drums of the company approaching. So far we have the evidence of fact, and not of opinion. He then estimates that it was almost a minute before the governor appeared, which is opinion merely. But after he appeared, and before he had turned into Washington Street, walking fast as he did, according to all the testimony, the Cadets were in sight below. Here again we have the evidence of fact. To return to matters of opinion, as testified by witnesses for the prosecution, the Hon. Mr Thorndike, President of the Senate, who was among the number merely waiting to be escorted, states that he should have judged that the whole time, which elapsed between the conclusion of the services and the moving of the procession out of the door of the meeting-house, might have been ten minutes—but he states this as merely conjectural, and qualifies the conjecture with the very appropriate remark, that when persons are waiting and anxious to move, the time seems often to be longer than it is. The Hon. Mr Fiske of the council, is also prudent upon this point. He says he cannot undertake to tell how many minutes it was after the services were concluded, before the governor went to the door of the church, though he thinks it was a much longer time than usual; and he illustrates the remarks just made, as to the state of mind in which gentlemen so situated were likely to be at that hour of the day, after services of a highly satisfactory duration, by adding, that a considerable degree of impatience was manifested in the members of the government; that the question was several times asked by those around him, where are the Cadets, and what has become of Col. Quincy, and why does not Col. Quincy return—all of which sense of intolerable delay was manifested in the space of half a minute, according to the estimate of Mr Constable Reed. So much for opinions, varying as to the extent of the delay, from half a min-

ute to a quarter of an hour. Then what are the facts? Is the case provided with any from which we can form for ourselves an accurate estimate of the real lapse of time between the conclusion of the services and the arrival of the Cadets at the meeting-house? There are such, and they are established by a concurrence of testimony, which cannot be shaken. In the first place, Mann, Braman and Robinson concur, that before the reverend clergyman who officiated on that day, had absolutely finished his discourse, both the messengers who had been employed, left the meeting-house, to summon the Cadets. Mann and Braman were themselves those messengers. They went severally. Mann ran all the way by the shortest route through Devonshire Street to the Exchange Coffee House, and there met Braman; and was informed that he had already notified the company. They both ran back the same way they came, Mann stopping only to speak for an instant to some persons, whom he met inquiring for the Cadets. Braman did not stop, and of course returned first to the church. Just as I got back to the church, he says, the governor was coming out of it. Here then we have a fact furnishing an accurate measure of the time from the closing of the sermon to the governor's leaving the meeting-house—it is the time which it would take an uncommonly active and athletic man to run from the Old South meeting-house through Devonshire Street to the Exchange Coffee House, to pass thence to a front room of the building on the lower story, pass up again to the door in Devonshire Street and run back to the Old South. This, the witness says, occupied him between 3 and 4 minutes; an estimate which he arrives at with great certainty, because he says that he ran the whole distance, and made no delay, and that to ascertain the time he has since walked from the Old South to the Exchange Coffee House and back in four minutes. Is this witness then to be believed? He is neither contradicted on the point, nor impeached. After a long and severe cross-examination his testimony in all respects stands unshaken—and he is contradicted in no particular by any witness on the part of the government except Col. Quincy, and by him only upon points in which Col. Quincy is himself contradicted by almost every witness on the stand. But Mr Braman does not stand alone in this testimony. It is directly corroborated by Mann, at the same time that Mann is an independent witness to the same fact. Mann says that after having dropped behind Braman an instant on their return to the church to answer an inquiry respecting the

Cadets, he resumed his course, and that when he came within a rod or two of the meeting-house, he saw the governor come to the door. With the exception of this instantaneous pause, he says he made no delay, and ran both ways, that he has since gone over the distance at about the same rate, to ascertain the time and that it took him just three minutes; and he thinks it might have taken him a little longer on Election day by reason only of the momentary conversation which he had on the way back. There can be no mistake in this; and this witness also is neither contradicted nor impeached. There is nothing on the part of the prosecution to set against the concurrent testimony of the two men founded wholly upon fact, and experiment, the truth of which every man may test for himself, except the loose opinion of Col. Quincy, and the cautious conjecture of Mr Thorndike. The testimony of Reed, Robinson, Clark and Spear on the other hand, witnesses under no impatience for an escort, all goes to show that the time could not have been longer. We are therefore irresistibly brought to the conclusion that the whole time, which elapsed from the termination of the sermon to the departure of the governor, did not exceed four minutes, of which one at least was probably occupied by the services which followed the sermon. Where then were the Cadets at the instant the governor left the church, and how long a time elapsed before they arrived at it. Here again we have the conclusive testimony of facts. Braman, Mann and Clark concur in testifying that while the governor was at the door, they heard the drums of the Cadets approaching; and Mann, Clark and Spear concur in testifying that they saw the Cadets in Milk Street nearly abreast of Devonshire Street before the governor had turned the corner of Washington Street. All the officers and members of the company, who were examined to that point concur likewise in stating, that they saw some of his excellency's suite at the head of Milk Street as soon as they came in sight of that point. And all the witnesses concur that the company were moving up Milk Street at a very fast march, though they had not then increased their pace to double quick. The company was not therefore half a minute in time behind his excellency; and less than four minutes must have elapsed, probably not more than three, from the conclusion of the services to the moment when the Cadets were abreast of the meeting-house. Now was this failure by three minutes, or four at most, to be upon the spot, when the services were ended, owing to any unmilitary or unofficerlike conduct

on the part of the Respondent? The fact itself proves nothing ; because the best officer that ever held a command, acting with the utmost military zeal, skill and discretion may by circumstances be led into an accidental error of far greater extent than a failure by three minutes to be at an appointed spot, not at an appointed time, but at the time when a certain event over which he has no control, shall happen.

It is sometimes easy to see after the event has happened, how a particular accident might have been avoided ; but we do not commonly impute even bad judgment to a man merely because he has met with an accident ; and it would be hard to say, that an officer acting in good faith and with ordinary care had been guilty of culpable unmilitary conduct, because he had committed a trifling error in judgment. The question must always be, not whether by pursuing a different course the accident might by possibility have been prevented, but whether the officer acted in good faith, and with common military discretion. In the present case it is not easy to see any more judicious course than that which the Respondent adopted ; none certainly by which the hazard of such an accident could have been avoided, without incurring more serious hazard in the lives of his men, unless he had marched them into the meeting-house, and this, by the way, would have saved nothing to the members of the government in respect to delay after the conclusion of the services ; since the men being dispersed, and their arms laid aside during the religious exercises, it would have taken at least three minutes after the conclusion to have collected the musicians, arranged the soldiers, and formed the company, so as to have been ready to receive the civil procession with customary honors. Will the court hold then, that it was unmilitary and un-officerlike conduct in the Respondent, that he did not originally elect to place his men in the meeting-house. That is, supposing that he ought to have foreseen danger, that services usually following the sermon, and which from time immemorial had occupied 15 or 20 minutes, (5 being enough for his purpose) would on this occasion be wholly omitted ; that he ought to have foreseen that the instruments of the musicians would be frozen up so that it would become impossible for them to pay the proper salute ; that he ought to have foreseen that a funeral procession near the church would make it necessary for him to remove his men ;—in short, that he ought to have foreseen all those circumstances which actually contributed to bring about the accident. Had these circumstances been foreseen, the

accident doubtless would not have happened ; but any other effectual means taken to prevent it would have been just as military and officerlike, as marching the men into the meeting-house ; and since the Respondent could not reasonably be expected to have foreseen these casualties, or any of them, it would be unwarrantable to say that he was even guilty of error in judgment in electing several days beforehand, when the question was proposed to him, to conform to the ancient usage of the company in marching to a convenient place of rendezvous close at hand, where the young men under his command could enjoy those customary festivities of the day which are among the inducements operating to bring them out on this occasion, instead of electing to march them into the meeting-house, where their enjoyments to say the least of it, would have been of a different description, and the prospect of which it is apprehended, though with much regret, might have rather thinned than augmented the ranks of the escort. Having once made that election, seats were no longer reserved for the corps, and the Respondent could not, if he would, have followed the procession into the meeting-house. But after all, the question is, not whether the Respondent could have acted more judiciously than he did, but whether there was anything so culpably negligent or unskilful in the course which he in fact pursued, as to render him obnoxious to military censure. Unless the court should decide that it was grossly culpable in the Respondent on the occasion of his first command to have elected to pursue the same course which had uniformly been pursued by his predecessors on Election day, it seems to follow that the Respondent cannot upon the evidence be found guilty under this specification of charge. There is another consideration which must be conclusive upon this specification of a charge of unmilitary and unofficerlike conduct. It is, that no fact is herein alleged, as constituting unmilitary and unofficerlike conduct, which had not been previously specified under one of the charges, namely, disobedience of orders and neglect of duty. It has been seen too that none of the statements hitherto examined and relied upon by the prosecution as constituting military offences of any kind are true according to the evidence, except the not being in readiness to escort the procession back to the State House. Now this cannot be unmilitary and unofficerlike, unless the Respondent had been expressly ordered to be in readiness for that service, or unless it were his general duty as an officer to perform it. In the former case he is clearly liable for breach of

orders; in the latter, equally so for neglect of duty. But it cannot be contended that he is liable for both; that is, that he is liable to be found guilty twice, as of distinct offences for the same identical misconduct. A man may be tried for murder, and found guilty of manslaughter; but he cannot upon the same facts be found guilty of both; or he may be indicted both for larceny and highway robbery, but the same taking of property *animo furendi* will not support both the indictments. If then, from proof of the facts stated in this specification of charge, the Respondent is found to have disobeyed orders, or to have neglected his duty, he must upon these facts be found guilty upon one or the other of those charges under which the same facts are specified against him, and therefore cannot be found guilty also, and subjected to additional punishment for unmilitary and unofficerlike conduct, consisting of the very same order broken or duty neglected. And if on the other hand he is found not to have broken any express order, neglected any prescribed duty, then he cannot be found guilty of unmilitary and unofficerlike conduct in these respects.

The second specification of the third charge, after reciting that the Respondent, being under orders of 24th Dec. and having reported pursuant thereto, and taken up the escort, and delivered the procession at the Old South, and having there received an order to be ready with his company, and to report for escort duty after half an hour, and having neglected to be in readiness to conduct the procession back in the usual and customary manner, of which he was conscious, and not having returned to the church until after the services were over, when most of the procession had dispersed, and the governor, &c, had proceeded some way returning in their usual course to the State House, *avers*, that the Respondent with his company in a *disorderly and unmilitary* manner ran through the streets, *with a view to intercept* the government, &c, and *did intercept* him &c, in the public highway, and without making any explanation, or *offering any apology* for previous neglect, and without requesting permission then to take up the escort, did in an *unmilitary and unofficerlike manner order his company in front of the government*, &c, which said company in obedience to said order *attempted to form in front of the government*, &c, and thereby *impeded* them, and *obliged them to change their course* from one part of the street, to another; all which was *unmilitary, unofficerlike*, and **HIGHLY DISRESPECTFUL** to the government, &c, and had a tendency to *bring the militia into ridicule*, and

the military forms and ceremonies of the government into contempt. By his excellency's order of the 4th of Jan. the Respondent was put under arrest for "disobedience of orders and neglect of duty" in the performance of the duties of that day, and nothing is therein suggested of unmilitary and unofficerlike conduct of the kind here stated. As this specification of charge therefore does not appear to be in pursuance of his excellency's express command, and it does not appear upon whose particular suggestion it was framed, the Respondent feels the greater liberty to say, that if anything can have a tendency to bring the militia into ridicule, and the military forms and ceremonies of the government into contempt, it is the preferring of such charges upon such facts as are found in this case. The charge is of sundry acts alleged to be unmilitary and unofficerlike, and highly disrespectful to the commander in chief. This specification, if it be wholly untrue, is little better than a libel under color of law. Any man who should read it, knowing nothing of the facts would be likely to infer, that the Respondent was some high handed outlaw, at the head of a gang of armed desperadoes calling themselves the Independent Company of Cadets, and that he and his associates, having been guilty of a riot in the public streets had terminated it by an aggravated assault upon the chief officers of the government. At least he would hardly suspect, that, this was a peaceful band of educated young gentlemen, who had assembled to pay a tribute of respect to the governor of the state, on the occasion of his re-election to office, and for this purpose had turned out in a military array, at some little personal inconvenience, on a day when regular troops would hardly have been paraded, on a mere service of ceremony; he would hardly imagine that the disorderly conduct imputed to them, consisted in a military movement somewhat hurried by an over anxious desire to tender him on the way an escort of honor, which they had accidentally failed by the lapse of half a minute to be ready for, at the time and place of his movement; or credit that their whole obstruction of his excellency's path was standing in line, in the middle of the street, and presenting arms to him as he passed upon the side-walk. Yet this is conduct unmilitary, unofficerlike and highly disrespectful to the commander in chief! Armed men running through the streets to the terror of the citizens! With the view of intercepting the chief magistrate of the commonwealth! Obstructing the highways! Confronting excellency! Impeding the course of government! Almost subverting the civil authori-

ty ! And bringing the military forms and ceremonies of the government on the day of General Election into contempt ! What are the facts which sustain this appalling charge ? Or rather in the first place let us extract and separate from the matters of aggravation the substance of the charge itself. The first part of it is that the Respondent with his company ran through the streets in a disorderly and unmilitary manner. This it is alleged that he did with a view to intercept the governor ; but whatever the motives may have been, the overt act consists only in the running through the streets in a disorderly and unmilitary manner. The next allegation is, that the Respondent did actually intercept the governor and his suite in the public highway, and having done so, attempted to form his company in front of the governor and his suite, and thereby impeded them, and turned them out of their course. And the circumstances of aggravation are, that all this was done without explanation or apology for previous neglect, and without requesting permission to take up the escort. What is the evidence then that the Respondent ran through the streets with his company in an unmilitary and disorderly manner ? The only witness called to this precise point on the part of the prosecution is Dr Hayward. This witness says that he first saw the Cadets at the Old South church. And that perceiving them to have made a mistake in point of time, he was induced to follow them, that they *marched* to the corner of Bromfield's Lane, and passed *rather rapidly* up Bromfield's Lane at the tap of the drum. To the question of the Prosecutor whether they ran or marched up Bromfield's Lane, his answer is, " they ran at the tap of the drum." To the question what was their condition as to confusion, or order, he answers that he was not near enough to judge. To a question from the court whether he had noticed the left flank, or rear, to be in a disorderly state, he says that he saw one individual and one only, lagging behind. Upon cross examination he stated that the walking was very slippery ; that he knew there was a distinction between common, quick and double quick time, but not precisely what, that he thought the company were marching in double quick time, until they got into Bromfield's Lane, and that they there increased to a run ; that he supposed the difference to be, that double quick time might be marked by music, and that running could not ; and that he never understood that running by the tap of the drum at a certain rate was marching in double quick time. This is not very

formidable evidence of an unmilitary and disorderly movement. Yet this is the only direct testimony adduced on the part of the prosecution to support the allegation, as to the movement in Bromfield's Lane. Another witness, Col. Quincy, is brought, who did not see the company in Bromfield's Lane but who testifies that their condition in Tremont Street was such as would lead to the inference, that they had been running in an unmilitary and disorderly manner, at the same time that his testimony tends to prove unmilitary and disorderly movements in Tremont Street. His testimony will presently be considered. Mr Newell A. Thompson, clerk of the Cadets was called by the Prosecutor ; called indeed for another part of the case, but having been also interrogated upon this, the Respondent has the benefit of his testimony. He states that the company moved through Bromfield's Lane in column, in double quick time, and as regularly as the state of the travelling would permit. This is the whole of the Prosecutor's evidence respecting unmilitary and disorderly movement through Bromfield's Lane. And even upon this the Respondent might pretty safely rest his case. There are two direct witnesses only. One of them Dr Hayward says that the company passed rather rapidly and ran off at the tap of the drum, that he was not near enough to judge of their order, but that he observed one man, and only one lagging in the rear. There is no error in this witness' testimony, excepting what arises from his having confounded quick time with double quick time, and from his supposing that running equably at the tap of the drum was in a military point of view marching in no time at all ; a mistake pardonable enough in a medical witness, whose professional pursuits have not led him deeper into military studies than was needful to qualify him for the post of surgeon to a battalion of artillery. Thompson on the other hand, who was himself in the company during the movement states, that it was a regular movement in column at double quick executed with as perfect regularity as was possible on slippery ground. The latter witness therefore explains away and neutralizes the testimony of the first as to the running, without the slightest discrepancy between them upon any matter of fact. Against this positive testimony of two eye witnesses, who describe what the movement actually was, no inference that it was of a different character can be permitted to be drawn from the testimony of others who did not see the company while executing the movement, but who undertake to describe its subsequent condition when in Tremont Street. If its

condition then was as is stated by Col. Quincy, it must have arisen from some other cause than the movement in Bromfield's Lane, as described by Hayward and Thompson. The character of that movement, if there were any doubt upon this testimony, is conclusively established however by the Respondent's witnesses. Capt. Sargent says, the movement was at double quick with trailed arms, and that he saw only one man, who was in the rear section, lose his place ; that he himself generally superintended changes of arms on the march, and gave the order to trail arms. Sergeant Thatcher was in command of the 3d section, the only disorder which he observed in his own section, was, that for a moment part of his men were at the trail and part at the shoulder, owing to his not having heard and repeated the order to trail ; none of his men fell in the rear ; Sergeant Murdock commanded the 1st section and says that none of his men fell in the rear ; that the column moved with fixed bayonets but in open order. Mr Thompson was in the 2d section and answers for its good order. In the absence of Sergeant Warren who commanded and Corporal Bryant who guided the 4th section, Mr Adams, a private was, summoned to testify respecting its movement. He states that the only disorder in that section was that he himself having slipped in the snow, fell two or three paces to the rear, and that one other private fell a considerable distance in the rear, that he saw no other man of the whole company out of place ; on cross examination as to the rate at which they moved, he says they ran in double quick time ; to the question whether he ran as fast as he could he says he did to regain his place, when he was in the rear, but not when he was with his company. Braman also, though not of the company, saw the whole movement, because he says, he kept alongside of the music, and he uses a term which describes exactly the double quick movement as it should be, when he says they went up Bromfield's Lane *on a trot*. Simpson, the drum major, states, that the time of the movement was double quick ; and though Spear says they moved much faster than any military people he ever saw before, and that he found it difficult to overtake, and keep up with them, yet he also states that he never himself turned out in any company, either as an officer or soldier, and has never been in the habit of observing military parades ; so that the result of his answer is that he never happened before to have observed a company moving at double quick. When asked as to the order of the company, he states, that he saw two individuals only straggling behind the main

body, which corresponds with the testimony of Adams. Several other witnesses, who were themselves engaged in this movement, being called to other points, were not inquired of respecting it, the Respondent believing farther evidence on this point unnecessary, and the Prosecutor probably considering that the less he inquired into the merits of this part of his case the better they would be likely to stand. The result of the whole evidence as to the movement of the company from the Exchange Coffee House into Tremont Street, is this: two or three men who at the Exchange had left the ranks against orders and without leave were not in their places when the company moved, but ran after the company, and regained them as they turned into Congress Street. The company marched in perfect military order, though at a very quick pace, somewhat faster than usual quick time, until they turned into Bromfield's Lane. They were then in column of sections, or companies, if the body be considered as a battalion, at shouldered arms, and fixed bayonets, as was requisite to be in readiness to take up an escort without a moment's delay. Each section or company presented a front of four or five files only. The column then opened ranks, trailed arms, and proceeded to the head of Bromfield's Lane in double quick time. In the execution of this movement on ground somewhat slippery two men of the rear section or company fell out of the ranks; one of them regained his place before the company reached the head of the lane; the other fell a considerable distance in the rear. The company having turned into Tremont Street, made a momentary halt to dress the ranks, and changing arms to the shoulder, resumed the march in quick time. The single private who was still in the rear probably rejoined the company at this halt, but whether he did or not does not expressly appear, and he himself not having been within reach of the process of the court during the trial, it has not been in the power of the Respondent to give positive proof of the fact. No witness remembers to have observed his joining the company afterwards, nor that his place was vacant, when the company came into line near Winter Street.

Now the question is, whether this was an unmilitary and disorderly proceeding. If the movement itself was a military movement, properly conducted by the commanding officer, he surely is not responsible, because two of his men happened by accident to fall a little in the rear, any more than because two or three broke his orders, and left their places at the Exchange.

In neither case was the Respondent in fault? If it should be argued that he was in fault to make a movement, the nature of which, under the circumstances, occasioned two of his men to get displaced; the same reasoning would lead us to the conclusion, that he ought never to move his company at all; for Gen. McNeil assures us, that it is not unusual, with regular troops under any circumstances, and in all movements, whether rapid or slow, for a man now and then to fall in the rear; and the court must be sensible from their own experience, that a man may occasionally stumble on bare ground, as well as sometimes slip on snow or ice, and in either case, if marching in a rank, he will infallibly fall more or less out of his place. And if he does, what is to be the consequence? Why of course, upon the principles of this prosecution, the commanding officer should be *court-martialed* and broken, or reprimanded, to say the least! This rather exceeds the military discipline of Frederick the Great. He once published a general order, it is said, which was, that if any man in his army should fall from his horse, or lose his hat in a high wind, he should be flogged for it at the head of the regiment; but it seems never to have occurred to that eminent disciplinarian, how much more suitable it would have been in every such case to have flogged the commanding officer. Due care however must be taken not to carry this principle so far upwards, as to bring all the penalties upon the commander in chief, and hold him responsible for all the acts, and all the accidents of all the men under his command. The question then recurs whether the movement in Bromfield's Lane was itself an improper one to have ordered, as being unmilitary and disorderly. Was it of a culpable character? Was it one for which an officer in the army would have been called to account? If not we hardly think he should be in the militia not in actual service. Now the Prosecutor is liberal enough to admit upon the record, that double quick time is a regular military movement; which reduces the question to this, whether it was unmilitary to use it in the formation and under the circumstances in which the Cadets then were. From some questions which fell from a member of the court, it was apprehended that a doubt may have existed in his mind as to the propriety of moving at double quick when in column, and especially with bayonets fixed, and whether it was not peculiarly a light infantry, and not an infantry movement; and whether the company having acted as infantry during the escort, could properly undertake to act as light infantry when on the march

by themselves. It is supposed, that these queries may be mainly answered out of the system of tactics for the infantry of the United States Army, as by law established, and published under authority. In the light infantry battalion drill, at Sec. No. 1822 of that work, it is prescribed that a battalion of light infantry *in column* will be put in march by the means prescribed at Sec. No. 932, and following for a battalion of infantry of the line; prefixing, as is remarked, if necessary, *double quick* to the command march. This is express authority for moving *light* infantry in column at double quick as a regular exercise; Sec. No. 1753, prescribes, that battalions of the line shall be well instructed in the exercises and movements of light infantry. It follows that battalions of the line must be trained to move in column at double quick. And in Sec. 1757, it is prescribed that whenever the company or battalion is to be put in motion in double quick time, or when double quick time is to be assumed on the march, the previous order to *trail arms* will be understood, and arms trailed accordingly. In truth, the only distinction in this respect between infantry and light infantry is, that the *habitual* movement of the former is in common time, and of the latter in quick time; but either may be made to move in double quick time, as occasion shall require. The only remaining question then is, whether bayonets must first necessarily be unfixed, or rather whether it is unmilitary and disorderly upon occasion to move in double quick without unfixing bayonets. When a battalion of the line is preparing to manœuvre as light infantry, merely, undoubtedly it is prescribed that bayonets be unfixed. But preparation for a course of manœuvre is one thing, and a single rapid movement is another. Light Infantry is usually manœuvred when in *close* order with unfixed bayonets. But it is prescribed (Sec. 1528, infantry tactics) that the bayonets of light infantry companies will, when acting in close order, be fixed *by command*; in open order, whenever the soldier finds it necessary for attack or defence, at his discretion. Of course it follows that light infantry companies may be manœuvred with fixed bayonets, *even in close order*, whenever the commander thinks proper; and of course, the same principle applies to an independent company acting as light infantry. But the movement in the present case was at open ranks, which removes the whole objection to the fixed bayonets. Nor does it make any difference that the company had been ordered out on that day for escort duty, since it was not rendering an escort service at the time the movement com-

plained of, was made, but was moving independently under the command of its own officer, to a point where he proposed to take up the escort, and of course he had a right to move his men to that point in any manner that is ever practised in military service upon any occasion whatever. It would have been perfectly military, for instance, and would be very likely to have been the mode adopted in regular service, for the Respondent on that day to have merely walked up with his company from its place of assembly to the neighborhood of the State House without music, at a route step, and arms at ease; there to have formed his line, received his excellency with the customary salutes, to have marched thence to the meeting-house, with all the pomp and circumstance of an escort of honor, and having delivered the procession with suitable regard to the military forms and ceremonies of the government on the day of General Election at the meeting-house, to have walked off again without music at a route step, and again to have returned to the meeting-house in like manner. And it was equally military, having accidentally failed to be on the spot at the instant his excellency moved, and being desirous to repair the failure as far as possible by tendering an escort on the way, to put his column into a double quick movement, for the purpose of arriving in season at the point designed. It would have been most unmilitary, certain, and unofficerlike, under such circumstances of pressing haste, first to have halted and unfixed bayonets, then to have moved in double quick time, then to have halted and fixed bayonets again, so as to have been in condition to pay a salute, and when the certain effect of these delays would have been to defeat the whole object of the movement. To test the principle of its being a military movement or not, we are not to inquire whether precisely such a movement is expressly prescribed in a system of daily instruction and drill, but whether it is directly at variance with anything in that system. For if an officer can do nothing which is not absolutely laid down in the book, it follows that he never can act upon any emergency whatever. But if any doubt rested on this point, whether we look to the prescribed system of infantry tactics, or the reason of the thing, it must be removed by the evidence before the court by the actual practice in the army of the United States under that system. Major Osgood had served nearly ten years in the United States Army, and though chiefly on the staff, must necessarily have become somewhat acquainted with practical movements. He says expressly that it is accord-

ing to military usage, to move at double quick, with arms at the trail, without unfixing bayonets, where time is important ; on cross examination he says, he thinks flank movements more frequent than in column under such circumstances ; that there is some danger in moving in column at great rapidity with fixed bayonets, and that it would in general be more expeditious and safe to make a flank movement ; but that if he were moving in column with open ranks, having but a short distance to go, he should not lose the time necessary to unfix bayonets, close ranks, and change from column to a file movement ; that there is nothing unmilitary or disorderly in moving in column with trailed arms and bayonets fixed, at double quick time, upon emergency, and that he would move in that manner even to get to parade in season, at least until near the parade ground, and then march into line by a flank. And this, as it happens, is precisely the movement which the Respondent made. Gen. McNeil had served in the army, and with great distinction as is known to the court, for more than 18 years, terminating but a short time since ; he was in actual service during the whole of the last war with Great Britain, and a considerable portion of the time since on the frontiers, and during the whole time of his service, has been exercising various commands from a company to a brigade, and from a garrison to a military district. Few officers, if any, could be found in the United States more intimately acquainted either with the principles or the practice of the system of military tactics now established. He is an infantry officer, and in the infantry of the line. He states that although double quick time is not often actually used in service, by well disciplined troops, yet that it is frequently practised at drills, and is actually used in service on occasions of emergency ; and among several illustrations which he gives of what he means by emergency, is the case of any delay or casualty having happened to prevent being on the ground in time. To the question whether it would be unmilitary for a company of infantry marching in column at open ranks, and having occasion to be at a particular point as soon as possible, for parade or other duty, to run in double quick time, with fixed bayonets and arms trailed, for a few rods, he answers that if the nature of the service required the men to be at a certain point immediately, it would be proper for the column either to open ranks and trail arms, or go by file ; that both methods are practised ; that generally the movement by column in open ranks is preferred where the ground will admit of it ; but that this is at the discretion of the officer ;

that if the distance is considerable, it is usual to unfix bayonets, but if short, and the emergency great, it is not. That if marching in column previously, time would be lost in changing to a file movement, and nothing gained in speed afterwards on good ground, but rather the reverse. Nothing is offered in behalf of the prosecution, to contradict or control this testimony in respect to military usage. It must therefore be taken as settled, that there was nothing unmilitary or disorderly in the movement through Bromfield's Lane. Is there any pretence for this part of the charge upon the evidence in relation to any subsequent movement of the company?

The witness, emphatically speaking of this part of the case in behalf of the prosecution, is Col. Quincy, the aid of his excellency on duty that day. As he is altogether the most important witness introduced by the Prosecutor, called for the whole case, and mainly relied upon to support it, it becomes needful for the Respondent and for the court, carefully to examine and compare with other evidence, the statements of this officer throughout, that we may give to them the weight which they deserve, and no more. In making such examination, and communicating their views of the result, the Respondent and his council hope they may be understood as impeaching in no degree the character of that gentleman, for whom they entertain no other than the most friendly feelings of personal respect and regard. But while they assure the court they esteem him to be an absolute gentleman, whose word is as good as his bond, testifying with the most perfect fairness of intention, according to his present recollections, they beg leave at the same time to show to the court that his recollections of this day's proceedings are quite wild and visionary, that his testimony on some points "waxes desperate with imagination," in short that he has run through the case in a most unmilitary and disorderly manner, to that degree that his testimony, which, under other circumstances and in ordinary cases, would have been entitled to the highest respect, is, under existing circumstances, and in the present case, entitled to no respect at all, and weighs absolutely nothing. It is somewhat extraordinary, but it so happens that there is hardly a point in the cause in which this witness is not either directly contradicted, or shown to be in manifest error by one or more witnesses. It may be well to see, whether this be not true in other particulars, before we proceed to examine his testimony as to the position and movements of the company in Tremont Street.

In the first place, then, he is at variance with Capt. Sargent as to the words of the order delivered to Capt. Sargent at the door of the meeting-house. In the next place, he is certain that he added to that order suggestions of his own as to the necessity of being on the spot at the close of the services. Capt. Sargent is equally certain that he did not. In the third place, he is sure that he said nothing about being at the door, or sending out an order to the company upon their reporting after half an hour. Capt. Sargent is equally confident that he did say, that he would either come out, or send out a further order, and it is in proof that the Respondent acted at the time on that supposition. In the fourth place, he testifies that the company were then marching away; when asked if he knows for what purpose or to what distance they were moving, he repeats without hesitation that they had evidently taken up the line of march, and were proceeding down the street; and that they proceeded in his sight more than the company's length. Yet it is in proof that the company moved altogether only about its own length and halted, having moved for the purpose not of marching away from the meeting-house, but of getting out of a snow-bank immediately before the door. Fifthly, he states that he saw at the meeting-house a printed order of exercises as is usual on such occasions, and he thinks that he saw the words of a very short anthem printed on it as to follow the sermon. The State printers testify that there were no printed orders of exercises on that day, and that it is not usual on the days of General Election to have any. Sixthly, to the question whether the company reported according to order after half an hour, he answers that they did not to his knowledge then or at any other time. Yet he himself states, that he heard the drums of the company returning to the meeting-house in about half an hour, and it is in proof that no other mode of reporting during divine service was ever known on such an occasion. Seventhly, he has no recollection of seeing Sergeant Murdock in the meeting-house. It is in proof, nevertheless, beyond question, that Sergeant Murdock was in the meeting-house, in a visible and conspicuous situation; and Sergeant Murdock himself testifies, that he thought Col. Quincy saw him, because he caught his eye several times. Eighthly, this witness testifies, that after the conclusion of the services, he made inquiries at the door of the constables, and other bystanders about the company but could get no information either as to where they were, or when they would be likely to return. Yet Robinson, the constable, states, that when Col.

Quincy made his appearance in the porch, and inquired for the company he himself told him, that he had despatched a messenger for them, and that in all probability they would be there in a few minutes ; and that they were then either at the Exchange, or on the march. Ninthly, he is very certain that Sheriff Sumner was the man who brought to him while at the door a message from the governor, directing his return, he is confident that he received but one such communication, and that from the sheriff. Yet Mr Constable Read swears that he was the man, who carried that message to Col. Quincy from the governor ? and the Prosecutor dares not call Sheriff Sumner to contradict it, as he might if it were not true. Tenthly, Col. Quincy thinks the procession was detained 10 or 15 minutes waiting for the Cadets after the services were over, and that he himself waited 10 minutes in the porch. Yet it is matter of demonstration that not more than two or three minutes could have elapsed from the conclusion of the services to the governor's leaving the church. Eleventhly, Col. Quincy insists that the order for the arrest of the Respondent was served as late as seven o'clock in the evening. The testimony of Garfield, who received the packet from his hands, is conclusive that it was not so late as six in the evening. Twelfthly, he says he knows that in Col. Baker's case the governor had not left the church, until after the hour for which the company had been dismissed, was elapsed, that the governor then walked up to the council chamber, and that after he had been there some minutes Col. Baker appeared. Yet Col. Baker states positively, that when he reported at the State House, he was within the hour by his own time, and only 5 minutes after by Col. Quincy's. Thirteenthly, he states at one moment that there was deep snow in Tremont Street except on the side-walk, and the next moment he states that the whole centre of the street was beaten down to nearly a uniform hardness with the crossing path, on which point he is contradicted by several credible witnesses, besides himself.

After this view of Col. Quincy's testimony on other points, so unfortunately and universally differing from that of the other witnesses, the Respondent finds himself the better prepared to stand up under his extraordinary statements of the condition and appearance of the company in Tremont Street. This subject, however, is so intimately connected with the charge of intercepting the governor, and turning him out of his course at that time and place, that it is somewhat difficult wholly to disconnect them, and perhaps may not be useful to attempt it. It may be

proper however to remind the court, that even if it should appear that there was some little confusion and disorder in the formations and manœuvres in Tremont Street, that no such thing is charged as matter of complaint in this specification. The charge is, first, of a disorderly and unmilitary running through the streets with a view to intercept the governor ! which can be intended to cover only the movement through Bromfield's Lane ; secondly, an actual intercepting of the governor, an attempt to form in his front, an obstructing of his path and turning him out of his course near the corner of Park Street. Whatever irregularities there may have been therefore in the company's movements in Tremont Street, not answering to the description of a disorderly running through the streets with a view to intercept the governor, or an actual intercepting and obstruction of his path, they are matters which the Respondent is not legally called upon to account for, but which having been testified to in the case, he prefers nevertheless to consider in connexion with this latter charge. He proceeds therefore to collate the testimony as applicable to both of these points together, namely, the unmilitary and disorderly appearance of the company in Tremont Street, and their interference with the governor and his suite.

Col. Quincy states, that on turning from Winter Street into Tremont Street they met the Cadets ; that the Respondent *was endeavoring to form them in a line* facing granite range, with the intention as he presumed of there paying the customary salutes and taking up the escort ; that by direction of his excellency, he carried and delivered a communication from his excellency to the Respondent, and then rejoined his excellency, and proceeded to the council chamber ; that when the governor turned the corner of Winter Street the Cadets were apparently filing from the right, but *were very much scattered* ; that at the moment the Respondent comes in sight of the governor and suite, as they turned the corner, he faced towards his men, and *endeavored to form them in a line as they came up* ; that at the time he delivered his excellency's message to the Respondent *a considerable number of the privates had not reached their stations in line* ; that there was a great deal of noise and confusion among the bystanders, especially when they perceived that the governor passed the company without accepting their escort ; that the *governor was turned out of his course by the attempt of the company to form in front of him*, or at least by the confusion which arose from the celerity of their movements ; that the Respondent was endeavoring to form his company in

the middle of the street and parallel to granite range, and that it was in passing across the street from the side-walk of granite range to the side-walk of Park Street corner, that the governor was turned out of his course ; that the company appeared to be filing from the right, and *as fast as they came into position were faced towards granite range ; that it was the rear of the company coming up to take their places*, that turned the governor from his path, he crossing in the usual pathway ; that he *can state positively that the governor stepped out of his path*, for in rejoining his excellency he was obliged to follow him for some distance, and that he appeared to be obliged to quit the path which he would naturally have held *on account of the rapid motion of the Cadets* ; that the right of the company rested about opposite to the second door from the corner of Winter Street ; that he cannot tell the name of any of the persons whom he saw cross his excellency's path, but is certain from their uniforms, that they were members of the company and *means to state positively, that some members of the company did cross his excellency's path* ; that he did not see the company present arms, or hear any such order ; that he did not see two of the company approach to take their usual posts as sentinels on each side of the governor ; that when he went to give the order to the Respondent, the Respondent was standing with his back towards him *getting his men into line*, and that he *placed himself between the Respondent and his company and faced towards him* when he spoke ; that the governor first passed from the middle of the street on to the side-walk in Winter Street when nearly opposite the passage way in rear of granite range ; that when he first saw the Cadets they were not marching, *that the greater part were running, evidently hurrying into line* ; that they did not appear to be approaching in column, *but were in a scattered condition* ; that his impression was, that they were, or had been filing from the right, and that those in rear did not keep pace with the front file ; *that a considerable number of the company appeared to him to be as far off as Bumstead Place*. Here it must be admitted is confusion and disorder enough. The company were in a scattered condition truly, if the right was near the corner of Winter Street and a considerable number running up as far off as Bumstead Place. Alas ! that so spirited a sketch of martial confusion and unmilitary disorder should turn out to be nothing after all but a fancy piece, and one of a very wild description.

The Hon. Mr Fiske of the council is then brought up to add

a touch or two to this picture ; but although he rather beautifies the confusion of the civil procession, and gives effect to the uproar of the multitude, he does not scatter the military quite so profusely as the colonel did.

He states that the ranks of the procession were so much broken after leaving Winter Street that for some moments he lost sight of the governor and the sheriff; that while in the crowd he perceived that the governor had passed the company and was on the side-walk in Park Street; that while he himself was passing through the crowd there was a general shout, the cause of which he could not conjecture; that after passing through the crowd he was joined by the President of the Senate, and afterwards Mr Locke and Mr Bangs came up, but that nearly all the members of the procession had got lost in the crowd; *that the cause of the breaking up of the procession was the crowd that came from the north through Tremont Street*; that the company was in advance of the crowd, and between the corner of Park Street and the corner of Winter Street; that everything was in such confusion at that time, that he was unable to distinguish, what was the situation of the company or what were their movements; that the company, the crowd and procession were in such a confused state, that he could not state what was the particular condition of the company; that as he lost sight of the governor immediately after turning the corner, *he does not know whether the company attempted to form in front of him*; that the governor and the procession had been moving up the central part of Winter Street, and that some obstruction caused them to turn on to the side-walk, *he believed it was a snowbank*; that the governor then passed into Tremont Street to cross over towards Park Street but how he got past the crowd, the witness did not know, as the crowd was between him and the governor; but *he cannot say that any members of the company intervened between the governor and the rest of the procession*; that it was a scene of great confusion; that he thinks *the company were in a scattered condition when he first saw them*, which was soon after turning the corner of Winter Street; that they might have formed line afterwards, but that the number of persons between himself and them was immediately very large, so that he could not distinguish their movements, or the situation of the governor. On cross examination, he answers, that he meant to state, that the company appeared to him in a scattered condition, and that the crowd was immediately so great, that he was unable to say what were their movements afterwards; that the company was

in a scattered condition, and if in a military condition, then it was so indistinct in the crowd that he was unable to tell what their position was; that *he does not mean to say that all the military movements intended to be performed were not properly performed*, but that the crowd was so great he could not see; that he once held a commission in the militia as aid-de-camp of Gen. Crane, but did not profess to be very much skilled in battalion manœuvres and drill.

Another witness on the part of the prosecution, Mr Thompson, has helped the Respondent a little to pick up these "dissecta membra" which may be literally translated these scattered members of his company, and in some degree to restore order out of chaos, so far as the military movements are concerned.

Mr Thompson's testimony when before adverted to, left the company in Tremont Street near the head of Bromfield's Lane; they were then in column, and as proved by the witnesses examined upon that remarkable passage up Bromfield's Lane, all the men were in their places — all with one exception at most, and in respect to him, at that time or afterwards, there is little evidence one way or the other, except of a negative character, no one having observed his absence. Capt. Sargent has a strong impression, but cannot swear that this man joined the company at the halt on entering Tremont Street. Thence Mr Thompson says they marched towards Winter Street in quick time; that he himself was in his place in line when he saw the adjutant general turn the corner of Winter Street, he being the only one of the governor's suite whom he distinguished; that he can't say that he distinctly remembers, but he thinks the rest of the company were then in line also, that he presented arms by order about the same time that he saw the adjutant general; that he can't speak of the precise time, or by whose order; that he can't say that he remembers to have heard the order; but that he should not have presented arms without an order; that there was a crowd mostly of boys, and very noisy; *that the company at the time he presented arms were in military order and remained so, and were not in a scattered condition*; that he does not mean to say they were otherwise than in military order before that time, but only that when in column he could not see the men in his rear; that *they were at no time, to his knowledge, in a scattered condition*, more than was absolutely necessary from the slippery walking in passing up Bromfield's Lane at double quick: that he himself did not at any time on that day cross his excellency's path, nor observe any other member of

the company do so; on farther examination by the Prosecutor he stated, that he did not distinguish the governor particularly in Tremont Street; but that he knew him when he saw him, and if he had run afoul of him he thought he should have known it; that he did not hear an order to form line; that he presumes they would not have been ordered to present arms except in line; that he thinks he *does* know the position they were in; that they were *in line*, and if in line, in *parade order*; that he does not recollect the particular order by which they came into line; that he knew the object of the commander, and saw others before him forming into line; that he does not remember how he got there, his impression is by files from the right; that *the company were at open order when they presented arms.*

This being the state of the evidence from the Prosecutor's witnesses, the Respondent will now ask the attention of the court to the testimony on his part. Capt. Sargent, the adjutant of the Cadets, states that after passing up Bromfield's Lane, the company were halted in Tremont Street near Bumstead Place; that they then shouldered arms, and marched in quick time, not faster, to very near the head of Winter Street when he thinks the order was given "left into line, wheel—Rear rank, open order—Present arms." Between the two latter orders he thinks his excellency and suite turned the corner of Winter Street, so that by the time his excellency had reached the centre of the company the latter order was executed; that as his excellency was crossing over to Park Street corner, two of the company, Tilden and Austin asked if they should resume their places, at his side; that he directed them to do so; on which they both went up to him just before he reached Park Street corner; but soon retired and came back to the company which in the meantime had shouldered arms, closed ranks, and he thinks were then counter-marching; after which they formed open column, and marched either in common or quick time up Park Street; that he himself saw his excellency pass from Winter Street towards Park Street; that his excellency did not notice the salute of the company in any way; that he passed them without the slightest notice, looking neither to the right, nor to the left, and walking very fast, as if he knew not that he was passing the company; but that his position was such, that it was impossible for him not to have observed their salute; that he himself was then on the extreme right of the company; that certainly there were no stragglers of the company between him

and Bumstead Place at that time ; that he should say none of the company intercepted the governor, or turned him from his path ; *that he heard Col. Quincy's testimony as to this part of the transaction, and that it was not accurate according to his knowledge ; either as to the governor's being intercepted by stragglers from the company or as to there being any stragglers extending to Bumstead Place ; that it was his duty as adjutant to superintend all parts of the battalion ; and that the company was not in a scattered condition at that time according to his recollection.*

On cross examination by the Prosecutor he states, that the halt near Bumstead Place was hardly for a moment, that he believes all the members of the company and all the musicians had joined it when they moved ; that he believes Mr Perkins was the last member who joined ; that the music had kept ahead of the company all the way up Bromfield's Lane ; that he should be unwilling to take his oath, that no member of the company or musician did join them, after they left Bumstead Place, but that his impression is very strong to that effect ; that when he first saw the governor he was on the side-walk, between the adjutant general and Col. Quincy, turning the corner of Winter Street ; that he is certain he saw him either as he turned the corner, or an instant after, and heard a number of voices crying, there he is ; that the right of the company he believes was opposite the first door of granite range, and the music on its right, the company in double rank, at open ranks, the officers in front ; that he has no recollection of the Respondent's position, his own was his usual position in line on the right ; that the musicians extended to near the corner of Winter Street, that he has no recollection that the band played, or that the drums ruffled ; that the adjutant general and Col. Quincy were on the side of the governor, or a little in rear of him, when arms were presented ; he thinks they continued with him from granite range to the State House ; that there was not a crowd between the governor and the company as he passed, though there might have been a few scattering people ; that there was a little noise and confusion, not much ; that Tilden and Austin first attempted to take their places by the governor's side as he crossed Tremont Street and just before he reached Park Street corner ; that the object of the halt near Bumstead Place was to reduce the men into more perfect order, to change the time, and bring arms to the shoulder ; that he saw the governor pass considerably to the left of the company he should think from five to eight feet beyond it.

Sergeant Thacher, who commanded the third section or company, says that after passing up Bromfield's Lane, the company were wheeled into Tremont Street and halted, that arms were changed, and they marched in quick time to granite range, the right he supposed near the corner of Winter Street; that he himself was nearly on the extreme left; that the order was given to wheel into line; that soon after, he saw the governor and suite at the corner of Winter Street on the side-walk; *that the company was then at open order; that he heard the order given to present arms*; that he saw two members of the company go forward from the right of the company, but did not know what became of them; that he saw the governor and his suite, as they were about crossing to Park Street corner; there was a crowd round them; the next time he saw them, they were on the side-walk of Park Street; that he did not see them approach very near the left of the company; *that he himself was near the left of the company and saw every man on his left, and that if the left had intercepted the governor he must have seen it.*

On cross examination by the Prosecutor, he stated that there was a crowd, whether it came with the governor or with the company he could not tell, that at some time it intercepted his view of the governor.

Sergeant Murdock stated that he commanded the first company or section; that the men of his company were in their places in line when the governor entered Tremont Street; that they were at open ranks, and presented arms when his excellency appeared; and that these movements were made by regular order. On cross examination by the Prosecutor, he stated that he remembers only the adjutant general and Col. Quincy as with the governor when he crossed Tremont Street; that they were a little in his rear; he can't say positively whether together, or not; he thinks the governor when they presented arms was at the right of the music, which was nearly opposite the corner of Winter Street; his impression is, it did not extend beyond; that the order to present arms was given in so audible a voice, that he thinks the governor must have heard it, as he was nearer to the Respondent, than he himself was, and he heard it distinctly; that he did not observe the rear of the column, after they had wheeled out of Bromfield's Lane into Tremont Street as he was in front of the first company.

Joseph T. Adams testified that he was a private posted on the right flank of the fourth company or section; that he re-

members being in line and presenting arms to the governor in Tremont Street ; that he should think, all the men of his section were in line also, as he did not observe any deficiency in number. On cross examination he stated that he did not recollect who ordered him to present arms ; that he could not undertake to say precisely what order was given previous to that ; that he remembers some order was given, which they conformed to when they came into line ; he thinks they were at closed ranks when they formed line — does not recollect what was their first change of position after that ; that according to his impression the governor was against the third building from the corner of Winter Street when they presented arms, but he could not say with certainty ; that he is not aware that there was any noise sufficient to prevent his hearing orders ; or any confusion in the crowd to interfere with the movements of the company ; that he heard some shouting, not more than usual when a company turns a corner, perhaps because the crowd was not so great as usual ; that he does not recollect to have observed either the absence or presence of Mr Perkins at the time they presented arms ; *that the left did not approach the flag stones, which cross from granite range to Park Street corner by the length of the company, or half the length of it certainly* ; that his recollection of details is imperfect in consequence of his not having attended to the subject from that time to this, and being much engaged with other matters. Major Inches testifies that the right wing of which he had the command was not in a scattered condition, but in military order in Tremont Street ; and he did not observe that the left wing was otherwise ; that as soon as he saw his excellency, *open order was taken by the men under his command, and arms presented* ; that he saw no notice taken of the salute except avoiding the company ; that in consequence of the density of the crowd, he does not recollect positively to have seen his excellency or suite after they passed the right of the company until he saw the adjutant general on the side-walk in Park Street, at which time the company were countermarching ; that he thinks the governor could not have been intercepted, but how far he went to the left he could not tell ; that he should not think it possible that the left could have extended to the usual crossing place.

On cross examination he stated that he saw the governor for a few paces after he had passed the corner of Winter Street, and not again until he was going up Park Street ; that he can't say what part of the company the governor was opposite to,

when they presented arms ; that he avoided the company by passing rapidly along with a part of the crowd between him and it, and that he did not see him acknowledge the salute ; that while he saw the governor he was moving rapidly, that after that he saw the adjutant general moving at a quick step, and he supposed of course his excellency was near him ; that there was a great crowd about the governor at the time he passed him ; that he cannot relate positively whether Col. Quincy was with him, his dress being dark, and he himself near-sighted ; that he could distinguish the adjutant general because his feathers were white, and his dress more highly ornamented with buff and gold ; that his own position was in front, in centre of the right wing ; that he does not mean to say he saw his excellency all the time until after he had passed him ; that he saw him about the time he passed him ; that he cannot say that he saw him at the moment the order was given to present arms ; that he was part of the time looking towards his men, and part of the time towards the governor ; that he does not know whether the order to present arms was given by the colonel, or by the adjutant.

Mr Austin testified that he was a private, posted on the extreme right of the rear rank of the first section ; and that during the escort from the State House, he marched on the left side of the governor and suite, for the purpose of keeping off the crowd ; that after the company were in line near the head of Winter Street, he asked Capt. Sargent if they, meaning Tilden and himself, should resume their places by the side of the governor ; that Capt. Sargent replied, yes ; that he then stepped from his place, passed between the right of the company and the music, and went forward towards the governor who was moving very rapidly, with a great many people around him ; that he followed the governor to the side-walk, Col. Quincy passed between him and the governor ; that he followed till he got to the vestry door of Park Street church, and stopped there finding the governor did not mean to receive the escort, but continued to move very rapidly up the street, and that he then returned to his place in the company, which had in the meantime counter-marched ; that the company as he passed round it, appeared to him to be in perfect military order, and he saw no member out of his place ; that he marched directly straight to the governor, but the governor moved so rapidly, that he had no chance of passing any salute, and could with great difficulty keep up with him ; that he returned before Tilden, whom he saw both when he went, and when he return-

ed ; that the governor was about half way between granite range and Park Street church, when he first saw him after he left his place in line, and that he joined him between that and the side-walk ; that he saw no man of the company intercept the governor or cross him ; and that he must have seen it, if it had happened. On cross examination he stated, that the music was on the right of the company, and that the right of the first section was almost opposite the second door of granite range, the left of the company extending towards the corner of the mall fence, and not crossing the flagging stones, which pass from granite range to Park Street corner ; that the crowd was on the governor's right when he crossed, and not between him and the company, but that when they stepped on to the side-walk, the governor was surrounded by the crowd, and he was himself ; that he saw the governor the whole time he was passing along the front of the company, and that there was no crowd to intercept the governor's view of the company ; that he passed 20 or 30 feet from the left flank ; the company being drawn up somewhat diagonally between the corner of Winter Street and Park Street, rather facing towards Hamilton Place than granite range ; that the governor passed rather nearer to the left flank, than he did to the right flank of the company, but that there was not a great deal of difference.

Mr Tilden testified, that he was detailed with Austin to keep off the crowd from the governor, and marched by his side from the State House to the church ; that he was detailed for the same duty near the head of Winter Street, and left the ranks to take his position ; that he came up with his excellency at the corner of Park Street, as he stepped on to the side-walk ; that he was proceeding to take his station on the right of his excellency, when the adjutant general stepped in between him and his excellency, and pushed him away on one side ; that he was at that time presenting arms to his excellency, and immediately came to the shoulder, and returned to the ranks ; that he does not know that his excellency saw him, but should hardly think he could have avoided it, as he was within three feet of him at his side ; that he did not notice his salute in any manner ; that he returned to the ranks, because he considered that his services were not wanted. On cross examination he stated, that when he took his position near the side of the governor, the adjutant general was a little in the rear ; that there was a crowd about the governor when he stepped on to the side-walk, and that they were fairly on the side-walk, and nearly at the corner of the church, when the adjutant general stepped in between them

from the rear ; that when he went round the left flank of the company, they were in military order.

Jarvis Braman testifies that he kept alongside of the company as they went up Bromfield's Lane, and thence as they marched towards Winter Street, until he got about opposite to Park Street corner, when he stopped about where the crossing stones are, and let the company march by him ; that the company marched to near the head of Winter Street, and formed line ; that he thinks he heard the Respondent order them to present arms ; that they did present arms after the governor came round the corner ; that the governor went from the corner of Winter Street nearly in a straight line to Park Street corner ; that while he was crossing, he saw Tilden and Austin go forward, and march along side to near Park Street side-walk, when some one pushed Tilden aside, and he returned ; that he should not think there was any crowd between the governor and the company at the time he crossed ; should think he might have seen the salute, and did not see as he noticed it ; should not think there was any disorder in the company at that time ; that he did not see any members of the company behind towards Bumstead Place ; did not see any of them interfere with or intercept the governor as he passed ; did not see any out of the line except Austin and Tilden ; that the governor passed clear of the left of the company which was nearly up to Park Street, and about opposite the corner of the mall. On cross examination he stated, that there was not a great crowd about the governor when he crossed ; there were a few persons, but the crowd was chiefly back of him, that he went farther than the crowd ; that there were a few people standing on the side-walk at Park Street corner ; that he did not see who pushed Tilden, but saw him fall a little back, and saw some person go against him who had on a uniform ; that he was pushed a little on one side, and back ; that there were two or three officers with the governor pretty near him, but one he thought a little behind, as they went on to Park Street corner, and Sheriff Sumner by his side ; that he knew Col. Quincy, but not the other officers ; believes there were three in the whole, but two certainly ; that they kept nearly by the governor's side until he got on to Park Street corner, when one fell a little to the rear ; that Col. Quincy stepped a little back as the governor crossed, to speak to one of the officers of the company ; that he faced towards the officer and stood with his back towards himself, does not know which of the officers it was, that it was not far

from the middle of the company ; that Col. Quincy did not exactly leave the governor to speak to the officer, but passed by near where the officer stood, the officers being then out in front of the company ; that he did not observe where the Respondent stood, that he knows part of the officers of the company ; knows Mr Thacher and Mr Sargent, and does not recollect the names of any others, but knows them when he sees them ; that he cannot tell which of the officers it was which Col. Quincy addressed, because he did not take notice enough to observe ; that when he first saw the governor, the governor was in the middle of the side-walk, the two officers with him, cannot say whether two or three ; cannot say which way the officer was facing whom Col. Quincy addressed, he did not take notice enough to tell ; it was after the order to present arms ; while the governor was crossing the street, he should say about half way between Winter Street and Park Street ; does not know whether it was the Respondent whom Col. Quincy spoke to ; did see the Respondent when the company was formed in line, nearly on the right as the company was going into line, and afterwards about the centre — where he should think he remained till after the governor passed ; does not recollect where Mr Thacher was, or where Mr Sargent was at that time, though he saw him in front some time during the proceeding — does not know who the two majors of the company are — knows all the officers by sight, not by name ; does not know what office Mr Thacher holds ; knows he is an officer because he saw him with a sword — does not think Col. Quincy stopped at all, that is to make any halt when he spoke to the officer, but spoke to him, as he was moving — should think he continued with the governor as he crossed ; did not have his eye on him, more than the others, he was looking both at the procession and the company ; that he saw him by the governor's side between Winter Street and Park Street ; does not mean that he was exactly by his side all the distance, but that during the time he was by his side, and so near that when he saw one, he saw the other ; that the company were facing towards granite range, the line a little inclining from Winter Street corner to Park Street corner, or nigher the side-walk of granite range by Winter Street — should think the governor passed within 8 or 10 feet of the line of the company ; that he passed nearly diagonally from Winter Street to Park Street, but might have gone 10 or 15 feet in Tremont Street — should think not more, before he left the side-walk ; that he himself continued to stand near the side-

walk of granite range, about where the crossing stones are, until after the governor passed him, when he walked along toward the church; that the governor passed within 10 or 12 feet of him; and that he himself was from 20 to 25 feet or a little more from the left of the company; that there were some people passing backwards and forwards, but not a large crowd between him and the company; that there were considerable many behind and around him, not 1000, nor 500, but a good many people running up from all directions to see the movements; that he did not hear any shouting as the governor was passing the company, but after he got on to the side-walk some boys hallooed; that there was no officer of the company so far in advance of the line as the one to whom Col. Quincy spoke; that it was when the governor was nigher to the right flank of the company than to the left; that he does not mean to say, that the governor was actually crossing the street at that time; that after he got into Tremont Street he went a few steps on the side-walk; and the line of the company being nigher to the side-walk on the right, than at the other end was all along about an equal distance from the course the governor took.

Daniel Simpson testifies that he acted as drum major; that he thinks the company went into line about the time the governor first made his appearance in Winter Street; that he himself was standing near the centre of Tremont Street about two thirds of the distance from Park Street to Winter Street, and that he first saw the governor coming up Winter Street, and saw him pass on to the side-walk; that he passed along on the side-walk in Tremont Street to near where the crossing place is, and then crossed over to Park Street corner; that he observed him particularly, because he thought he walked uncommonly fast; that as he came up, the company presented arms, but he observed the governor did not pull his hat off, and made no halt at all; that he should think he must have seen the salute of the company; but can't say that he did; that he passed within 8 feet of some part of the company and within from 8 to 15 feet along the whole line; that he looked pretty straight forward; that he should not think there were any persons between the governor and the right of the company but there might have been at the left, as some persons who were pretty near might have crowded in; that about the same time that he first saw the governor in Winter Street, the company were about throwing themselves into line; that he did not see any of the company out of their places; that he saw Capt. Sargent in

front on the right, and believes the Respondent was farther on the right and a little in the rear of Capt. Sargent ; that the governor might have passed within seven or eight feet of where Capt. Sargent stood, and within 10 or 11 of the Respondent ; that he cannot say at what time this was exactly.

On cross examination he states, that at the time the company presented arms he thinks the Respondent was on the right, a little in rear of Capt. Sargent — thinks the band did not play, but would not be willing to swear to it — did not notice the other officers at the time — thinks it likely there were persons between the Respondent and the governor ; cannot say whether the Respondent presented his sword — nor how far he was from his own position ; that he saw the Respondent either at the time or just before, or just after, but cannot say as to the moment — cannot say why the band did not play — does not know whether the company were at open ranks ; that the band was on the right, but rather in the rear, not in line, but four deep, facing down Tremont Street — cannot say why they did not wheel into line.

The testimony as to the state of affairs in Tremont Street being thus left by the Respondent, a reinforcement was brought up by the adjutant general with a view of throwing a little new disorder into the ranks of the enemy. The Hon. Mr Thorndike, President of the Senate, being called, testified that he was in the procession with the governor ; that as they approached the head of Winter Street he noticed the Cadets in line, facing towards Winter Street, though most of the line was north of it ; that he saw the governor and those who were between him and the governor in the procession pass to the side-walk on the east side of Tremont Street ; and he believes that he afterwards noticed the governor attempting to cross Tremont Street where the path ran ; that he himself and the gentleman with him did not attempt to follow the governor, but attempted to pass diagonally, and were checked by some movement of the company which appeared to be a wheeling by sections or other divisions from the right on to the left, as witness supposed with the object of forming open column to escort the governor ; he recollected being struck with some surprise that the whole of the company did not apparently follow the first section ; that one or two of the sections appeared to be separated ; that it did not follow on immediately, because as he supposed, either the order was not understood, or there was some imperfection in the execution ; he perceived then that the governor had passed ; that in consequence

of this manœuvre he himself did not reach his place in the procession, but was separated from it, and lost the gentleman who was walking with him in the crowd; that he at last got across to the side-walk in Park Street, within view of the governor and at no very great distance; that there was a good deal of noise and quite a crowd at the time he passed; that the crowd set up a shout, in consequence as he supposed of the Cadets not being able to precede the governor; that he saw the right of the company before he came out of Winter Street; that they were west of the centre of Tremont Street; that the middle of the street directly in front of the company was not then occupied; but that on the left towards the church it seemed to be filled; that he is not sure why he left the procession, but his impression is, because he thought he could take a more direct course; that he did not see any salute, and did not observe whether the company were in open or closed, single or double ranks; does not recollect whether the music played or not; thinks there was a crowd at the time when, and very near the place where, the governor passed, but does not know that the governor passed through it; that he did not perceive any disorder, though there was some shouting in the crowd; that there appeared to be some running hither and thither both of the company and the crowd; that the company did not appear to be as much connected together as it usually is; that he has no recollection of seeing any of the officers; that if they had been in front of the company no doubt he should have seen them.

On cross examination he stated, that the distance between himself and the governor, as the latter passed the company, was probably the full width of Tremont Street; that he noticed what he called disorder in the company, but whether it was before or after the governor passed, he does not know; it was about the time; that he did not observe any other confusion or disorder in the company, than that which he had before spoken of when they were endeavoring to break into column; that he did not mean to express any belief or opinion that the officers were not in front of the company when it was in line; that the governor must have passed very near to the left of the company; that he passed generally on the side-walk, while they were in the middle of the street; that there was not at the time of the governor's passing any such crowd between him and the company as would have prevented his having a full view of it; that he himself was looking towards the company but not observing them very particularly; that he did not mean

to be understood as stating that the company did not present arms; that he does not know whether they did or not; that he did not see or hear the Respondent, that he noticed an evolution of the company, which appeared to be the result of an order giving a direction to the company towards the path of the governor; that it appeared to him at the time, that the object of that movement was to escort the governor; that he saw nothing indicative of disrespect; that the company appeared to him to be drawn up in line for the purpose of receiving the procession; that he had once been a captain of a light infantry company in Beverly, but it was 16 years ago, that he had not attended to military matters since, and is not acquainted with the modern system of tactics.

Mr Secretary Bangs testified, that he walked in the procession immediately in rear of the council; that as the procession approached the head of Winter Street, he saw the Cadets in Tremont Street; that he was somewhat more in the rear of the governor at that time than commonly; that he first saw the company in the act of wheeling as he thought, between Winter Street and Park Street church, the head of the company being about against Winter Street; that he saw the governor as soon he should think as he reached the head of the company turn to the right with his suite; that immediately after the pressure of the crowd became so great as to throw that part of the procession where the witness was into some confusion; that after moving a few steps he found he should have to force his way through the crowd, and he stopped and let the multitude pass on, and afterwards made his way leisurely to the State House, entirely disconnected with the procession; that after a minute or two from the time he saw the governor turn to the right he did not see him again until he saw him in the council chamber; that the procession was in part broken up, he should think all to the rear of the place where he walked, but of this he is not confident, as after he left the procession he paid no attention either to it or to the military; that the cause of the breaking up of the procession was the pressure of the multitude upon it; that part of this multitude had come with the procession; that the adjutant general and Colonel Quincy were with the governor when he turned to the right near the head of Winter Street; that he did not see them afterwards; that he was unable to say as to the military appearance of the company as he paid no attention to it at all, excepting that he saw them afterwards marching up Park Street; that he has no recollection either of hearing the band

play, or seeing the company salute in Tremont Street; that he heard music, but whether while the governor was passing the company he cannot say.

This witness was not cross examined on the part of the Respondent.

Col. Henry F. Baker testified, that he saw the company from the head of Park Street apparently filing in front of granite range, and that he saw them subsequently countermarch and move off; which is all he testifies on this subject.

Finally, to complete the route of the Respondent's little command, the adjutant general calls himself as a witness, and causes himself to be asked what he saw at the head of Winter Street and in Tremont Street; to which he answers, that he was with the governor, and when at or near the head of Winter Street, saw the Cadets in the middle of the road in Tremont Street; that the procession was then walking up Winter Street; that the governor said "this won't do," and turned off on to the side-walk, proceeded some way on it, and crossed towards Park Street church, and at that time he has no recollection of being at his side, or very near him, and must have been in his rear, because he overtook him afterwards; that when he came up with him on the side-walk in Park Street he walked with him up to the State House; that if Mr Tilden was on his side when he came up, he has no distinct recollection of the circumstance, and if he pushed him aside in coming up behind, it was entirely unintentional, and was probably done by the witness's taking his proper position between him and the governor; that in respect to the fact stated in the company records, that this movement of his excellency was probably by advice of the chief of his staff, he could positively declare that his excellency did not confer with him upon this subject; nor did he know that Col. Quincy had been despatched with an order to dismiss the company from further service until some time afterwards.

The Judge Advocate, probably considering that this testimony of the Prosecutor, was somewhat wandering from the question as to what he saw in Tremont Street and was tending rather to vindicate himself, than to convict the Respondent, then puts another question, which is, whether he had heard the testimony of the Hon. Mr Thorndike and Mr Secretary Bangs, respecting the appearance of the company and procession, and if so, whether it was correct or not. To which the adjutant general answers, that in relation to that he should say, that when he

saw that the governor did not intend to be escorted from that place to the State House and stepped aside, that he followed him as near as he could without taking particular observation of the company ; that he saw no salute and heard no music ; but he did not however take particular notice of the company, and therefore is not able to state whether the facts testified to by them in relation to the Cadets are correct or not.

After this the judge advocate did not probably think it necessary or expedient to inquire of the prosecuting witness whether the testimony of *Col. Quincy* as to the appearance of the company, with its right by the corner of Winter Street, and its left scattering along towards Bumstead Place, was correct or not, and so the testimony closes upon this part of the case, after having consumed so much time of the court in the taking of it, that even the reading of this summary abstract has occupied more of their time, than the Respondent could have wished.

And what is the result of the whole? Does it make the slightest approach to anything culpable in a military point of view on the part of the Respondent? Does it even exhibit a case of very remarkable disorder or irregularity in the evolutions of the company? Does it show that the governor was even accidentally obstructed or crossed by a single man under the Respondent's command? Does it not indicate anything rather than an intentional disrespect?

It was a scene in the whole, somewhat hurried and confused. But the Respondent surely may be pardoned for suggesting that the hurry was occasioned by his excellency and the confusion by the crowd. In endeavoring to extract the truth out of this mass of testimony, it is the duty of the court to reconcile with each other the statements of the different witnesses as far as possible ; and there is little difficulty in doing so in the material parts, having regard to the respective positions which they occupied, and fixing the point of time to which their respective statements relates, excepting that some parts of *Col. Quincy's* testimony are totally irreconcilable with that of all the other witnesses.

The real transaction was thus. The company being in column near the head of Bromfield's Lane and every man being in his place, with one possible but not probable exception ; was marched in quick time to near the head of Winter Street, and there wheeled or filed, it matters not which, into line, facing towards granite range, its right nearly opposite the 1st or 2d door from the corner, its left towards the corner of Park Street and the

mall fence, and somewhat thrown back, so as not to present a line parallel with the street, but rather standing across it. On comparing the testimony in this particular no discrepancy will be found. The witnesses who speak generally of the front of the company as towards granite range were not inquired of more particularly as to the direction of the line. The music did not come into line at the same time with the company and the Respondent takes the occasion to ask whether they were ever known to do so? They stood, however, on the right of the company extending quite or very near to the corner of Winter Street.

This formation was completed and ranks opened either just before or at the instant the governor turned the corner. There is no discrepancy here except in the testimony of Col. Quincy, who is at variance with all the other witnesses on this point. Simpson, the drum major, says that when the governor first appeared, the company was about throwing themselves into line; that is, when he first appeared to him, for he, being on the right of the whole company, looked some way down Winter Street, and saw the governor as he says in the centre of Winter Street before he passed on to the side-walk; just as Mr Thorndike, Mr Bangs and the adjutant general coming up Winter Street, saw a part of the line of the Cadets in Tremont Street. Mr Thorndike says, that when he first saw them they were in line, and as he was some thirty feet in rear of the governor it is probable that when the governor and Col. Quincy first saw them, and of course when Simpson first saw the governor, the Cadets were about coming into line. The governor having gone on to the side-walk in Winter Street none of the other witnesses in Tremont Street could have seen him of course until he turned the corner, and when he did turn the corner, they all agree except Col. Quincy, that the company was in line and at opened ranks; Col. Quincy insists that the men were then and long after running up from Bumstead Place, and that the Respondent was endeavoring to get them into line, catching them one by one as they came up and facing them towards granite range. Immediately after they presented arms. All the witnesses of the company agree in this, differing only slightly, which might be expected, as to what point in the line of the company the governor was opposite to when the motion was executed. Brame who was a mere spectator and who had chosen his point of view states the same thing. The officers were at their posts in front. Simpson says indeed that he saw the Respondent and Capt. Sargent in front of the right of the company, but is not

sure of the time when he saw them there, and it is manifest from the other witnesses that it must have been at the same time he first saw the governor in Winter Street while the company was forming line, and while the officers were superintending that movement. The line being formed, the Respondent passed to his post in front of the centre ; so say the members of the company. Braman remembers after seeing him near the right to have seen him near the centre. One singular coincidence of testimony proves that the Respondent was at his post in front of the centre before the governor passed. It is this, Braman testifies that he saw Col. Quincy speak to one of the officers of the company but did not observe which, he did not take notice enough of him at the time to say whether it was or was not the Respondent ; that he was, however, about opposite the centre of the company and farther advanced than any other officer and nearer the line upon which the governor crossed. Col. Quincy proves that the officer thus spoken to was the Respondent, and his position as described by Braman without knowing that it was the Respondent, is precisely that which he should have occupied. There is some apparent discrepancy resulting probably in part from the different points of view of the witnesses as to the spot where the governor began to cross from the sidewalk towards Park Street corner. Probably the path through the snow ran more diagonally than the crossing stones run, so that Braman's description of the governor's course as being nearly straight across from the corner of Winter Street to the corner of Park Street a few paces only being passed over on the side-walk is nearly correct. And this carries him more nearly along the line of the company which was somewhat standing across the street. In this case he would pass not far from the Respondent's position and enable Col. Quincy to speak to the Respondent in passing with a momentary pause only. Braman so describes it, and Col. Quincy himself says that he did not wait long enough to hear a reply. In the meantime the governor was passing on with great rapidity, so that neither the adjutant general or Col. Quincy could keep up with him, nor the two sentinels who were detailed for the purpose to overtake him, until he reached Park Street corner.

There is no discrepancy as to these movements, Col. Quincy's statement being always excepted. While the governor was passing the company, Mr Fiske who was some ways in his rear, must have turned the corner. There was no crowd, as the weight of evidence is, between the governor and the company,

for he walked as some of the witnesses expressed it, faster than the crowd ; so that the crowd was doubtless between Mr Fiske and the company. And here it may be remarked that Mr Fiske's testimony as to the company's being in a scattered condition to the extent that he describes it, seen as it was by him indistinctly through the crowd, is perfectly reconcilable with the facts. The company acting as a battalion was at open order ; the front rank consisted of only sixteen or eighteen men — four paces behind them was the rear rank consisting of nearly as many — a few paces in advance of the front rank was the line of company officers — four in number at intervals of 8 or 10 feet apart — a pace or two in advance of them again and at an interval of some 15 or 20 feet were the two commanders of the wings — and a pace or two in front of them again was the commander of the whole. This though a perfect military order does, nevertheless, from the small number of men representing a battalion, exhibit to an unmilitary eye at least something of a scattered appearance. Add to this some five and twenty musicians on the right not in their places, as they never are, the two sentinels hurrying after the governor, and a crowd of people pressing in, in all directions as soon as he had passed the company, and we shall not think it remarkable that the company seemed to Mr Fiske as he approached it in flank and saw it through the crowd to be in a scattered condition. As soon as the governor had passed the left flank of the company without acknowledging the salute, the Respondent still thinking it his duty to offer the escort, countermarched his company and formed open column ; this was the wheeling from the right into the left, which Mr Thorndike saw as he entered Tremont Street and in the performance of which movement he thinks there was some hesitation or delay in one or two of the sections producing a momentary separation between parts of the company. This also was the wheeling which Mr Bangs saw who came into view about the same time. The crowd who had followed the governor *haud passibus equis* up Winter Street joining at this time with the crowd which is always collected about the band of a military company, and the crowd from Tremont Street who were running up in all directions, made an amalgamation of parties, which unfortunately dismembered the civil procession and separated the secretary from the rest of the commonwealth, so that the secretary walked alone to the council chamber. And all this, which takes up some time in the description, was the work of a moment. The company presented arms, should-

dered arms, closed ranks, faced to the right, countermarched to the left and broke into column, to say nothing of the movements of the procession, and of the two sentinels, and the three or four several crowds, all in the brief instant of time during which a very fast walker can pass from the corner of Winter Street to the corner of Park Street. So that it is not wonderful if there seemed to be some little hurry and confusion, especially to one who was himself moving or moved in the midst of it.

We have no difficulty then in reconciling the statements of all the other witnesses; but we confess that we are utterly unable to do so with Col. Quincy's.

When he states for instance that at the time he delivered his excellency's message to the Respondent a considerable number of the privates had not reached their stations in line, and that the Respondent was then endeavoring to form them as they came up, that the rear of the company coming up crossed the governor's path as he passed over to Park Street and turned him out of it; that the men were not marching, but some walking and some running, evidently hurrying into line, and that a considerable number of the company appeared to him to be as far off as Bumstead Place, it is not only impossible to reconcile these statements with those of any other witness in the case, but it is extremely difficult even to trace out the fact in the actual state of things which operated upon his senses, upon which at the same time his imagination operated in some dreamy state of existence to conjure up this vision. No other man is found in the whole community who saw any such things. Every man of the company stands ready to swear and as many as human patience would permit us to examine have sworn, that they were severally and respectively in their places in line and so presented arms when the governor appeared in Tremont Street, and at no time crossed his path. These witnesses cannot be mistaken as to where they themselves were. They say also that the rest of the company were in line and did not cross the governor's path. The Hon. Mr Thorndike says they were in line when he first saw them and that was while he was yet in Winter Street. Austin and Tilden in attempting to overtake the governor passed along the whole front of the company and round the left flank; they say there was nobody between them and the company; the Hon. Mr Thorndike says that the whole space in front of the company at that time was unoccupied; Austin and Tilden, therefore, had a perfect view of the whole company and they severally swear that it appeared to

them in perfect order, that they saw no man out of place, that the governor passed clear by many paces of the left flank of the company, that they saw no man cross him, and following him as they were, it is utterly impossible that any man in uniform should have crossed his path without their perceiving it. There was nobody from the company to cross his path, the men having previously gone into line and the left of the line not extending to the crossing path. Braman, a disinterested spectator, engaged himself in none of the movements, standing in a convenient position to see the whole, and having no other object in view than to see the whole, describes the whole position precisely as the several witnesses of the company had described the parts which came under their personal observation. These 20 men or more cannot all be mistaken; they cannot be supposed to confederate in falsehood. Col. Quincy then must be utterly mistaken and his testimony being thus weighed down by the Respondent's witnesses, what does the Prosecutor bring up to support it? First, Mr Thorndike, who contradicted it by showing that the company were in line before the governor turned into Tremont Street, and in no disorder, he saw none, until he saw the wheeling which he speaks of, and which was a wheeling by files, or countermarching as it is technically termed, which was after the governor had passed the left and in which movement he saw only a trifling irregularity. Secondly, Mr Bangs, who saw nothing but the crowd? And thirdly, the adjutant general, who must have seen all there was, who is asked expressly to tell what he did see, and tells nothing that corroborates the testimony of Col. Quincy, or helps the cause of the prosecution in a single particular?

Col. Quincy therefore stands without support anywhere, contradicted everywhere, in this part of the case and the only solution the Respondent and his counsel have been able to give to the error, was that the witness has confounded in his mind the countermarch which was made, just as the governor passed the left, and which, somewhat irregularly executed by a delay in the rear sections, repaired of course by running to regain their places, and which mistake the Respondent was endeavoring to rectify, with the idea of an endeavor to form the rear in line; that he saw the two sentinels, Tilden and Austin, near the governor, perhaps met them as they came back from Park Street corner hastening to resume their places and perhaps took them for some of the rear of the company running up into line; but what he saw over in Bumstead Place which looked like a considerable

number of the company, the Respondent is at a loss to imagine, unless it were an atmospheric illusion upon the principle which turns the image of one's own frigate painted on the clouds into the phantom of a flying Dutchman.

The Respondent has too much respect for the members of this court to ask them whether they can upon their oaths and their consciences find him guilty of anything upon the evidence under this unfounded and frivolous charge.

The Complainant's own witnesses testify that they saw nothing in the conduct of the Respondent or his corps, indicating any other design than to receive the procession at the head of Winter Street with honor, and thence to escort it to the State House. Not a man can the prosecuting officer find who imagined any other intent. There was no unmilitary and disorderly running through the streets. There was no attempt to form the company in front of the governor, thereby impeding him and obliging him to change his course.

The company were, where they had a right to be, in one of the public streets, not obstructing it, but leaving ample room for others, not there for an improper purpose, but to offer an escort of honor to the commander in chief. The governor arrived on the spot and seeing the company, endeavored to avoid it, though whether he was first induced to deviate from that venerable custom of the government on days of General Election so industriously proved, of walking in the middle of the street by the sight of the company, or the sight of a formidable snowbank, appears doubtful upon the evidence. At any rate he moved on to the cleared sidewalk and passed wholly beyond the company before he met with any obstruction. If he afterwards met any, it was not from men under the command of the Respondent; and if the procession was broken up it was not by the company but by the multitude. The Hon. Mr Thorndike is the only witness who speaks of being checked by the movement of the company; and how did that happen? He did not follow the governor but thinking he could pursue a more direct course attempted to pass in front of the company at the moment they were executing their countermarch. If he had not previously left the procession he would not have been interfered with by the company; and he saw nothing in the movement "highly disrespectful" either to himself or the commander in chief. But it is complained that the Respondent did not at that time make any explanation of his previous neglect, or offer any apology, or ask permission to take up the escort. Did his excellency then

doubt for what purpose the company were then and there drawn up? It would be strange if he did when not a witness is found who did not consider it a tender of an escort. Could an escort have been tendered in any more military and officerlike mode, than by drawing up the company to present arms to him as he passed? And as for explanation or apology, what opportunity was there for that, when his excellency instead of pausing to acknowledge the salute or to receive a communication passed by, looking neither to the right nor to the left, with such hasty strides that his staff could not keep up with him and the sentinels detailed to protect him from the crowd, could not for some time overtake him.

If therefore confusion ensued and his excellency or others of the procession were put to inconvenience by the crowd, the Respondent asks whether it was not owing to his excellency's haste and his refusal to accept the escort, and whether all the inconvenience would not have been avoided by a contrary course? It was when his excellency was seen to pass the company without notice, and the company were seen vainly endeavoring to furnish him with an escort, that the multitude shouted and rushed in, to follow the movement and see the consequences. The Respondent would not be understood by these remarks as meaning to throw blame on his excellency for the course which he thought fit to pursue, but to put the plain truth before the court in such a light that they may see that it was not owing to any improper act of the Respondent or of the men under his command if disaster befel the procession of the civil authorities.

But time enough has been occupied with this part of the case, and the Respondent proceeds to consider the 3d and last specification of the 3d and last charge.

It is, that the Respondent being under the orders of Dec. 24th, and having reported in obedience thereto, and having taken up the escort as ordered, and having conducted the procession to the Old South church, and having departed therefrom, and having neglected to return in season to receive the procession again and conduct it back, and having intercepted and impeded the governor, &c, on their return as in the first and second specifications of this charge is set forth, was, while so intercepting and impeding the governor, &c, *informed and ordered that his excellency had no further orders for him*; yet, after receiving said order and after the governor and suite had passed the company, the Respondent *marched his company up Park Street close behind the*

governor to the State House, and there formed line as if not dismissed from duty, and then *without making any explanation, or offering any apology* for his disrespect and neglect as aforesaid, or even asking permission so to do, in contempt of the last order, sent his adjutant up to report for further orders; all which was highly unmilitary and disrespectful and subversive of good order and discipline.

The gravamen of this charge is, *contempt and intentional disrespect*. The fact alleged as constituting it, is that the Respondent being informed in the street that his excellency had no further orders for him, nevertheless marched his company up Park Street, and sent his adjutant to report that he was ready to receive further orders if any there were. The matters of aggravation are, that he marched his company close behind the governor, and that he did not at that time make any explanation or offer any apology, or even ask permission so to do.

If the acts here charged to have been done, were not done from the motive alleged, they are totally immaterial to the complaint. Where is the military offence of marching up Park Street even near to the person of his excellency, and sending an orderly officer to inquire whether there are further orders or not, after a previous informed intimation in the street that there were none, unless this were done in the spirit of contempt and insubordination? Whether this was the motive of the Respondent or not, the court will judge upon a general view of the whole case, to which the discussion of this subject belongs, under which it will be more conveniently considered than under this particular specification of charge.

Under this however it will be proper first to consider what the evidence is, bearing directly upon the matters here charged. The only witness to prove the communication from his excellency to the Respondent in Tremont Street is Col. Quincy, whom we have before seen to be most inaccurate in his recollections of the events and orders of the day. But on the present point there is no witness to control or contradict him; the only parties to the transaction being Col. Quincy and the Respondent himself, who cannot be a witness in his own cause. We must therefore examine the testimony of the witness here by itself, gathering such light as we can collaterally, from the known facts and circumstances of the case.

The witness states that while the Respondent was endeavoring to form his men in line near the head of Winter Street, he carried by direction of his excellency, a communication which

he delivered to the Respondent in person, stating, "that the governor had no further orders for the Cadets that day." On cross examination he stated that the words were "the governor has no further orders for you," or to that effect; he is positive that he used the words "has no further orders for you;" and on a subsequent examination he says that his excellency's words, as near as he remembers, were, "Tell Col. Winthrop I have no further orders for him;" so that the witness, notwithstanding the memorandum which he made in the council chamber and which he says he had before him when he testified, does not entirely agree with himself as to the exact words used.

He states that at the time he delivered the message, the Respondent was endeavoring to form his men in line as they came up. In this respect he has been shown to be entirely mistaken. He states that the Respondent was facing his company, and with his back towards granite range, that he passed between him and the company, and faced him as he spoke. This would have brought him facing towards Braman. Yet Braman testifies that he saw him speak to the officer; that the officer was facing towards granite range, that Col. Quincy passed in front of him, and as he passed, turned and spoke to him, so that his back was towards Braman.

He is asked whether he is confident that the Respondent heard and understood him. He says that he has no doubt of it. It is going a good ways to undertake to answer not only for what another heard but for what he understood; especially if engaged as he says in superintending a hurried formation of his men. And yet while he says that he has not the slightest doubt that the Respondent heard and comprehended the order, he admits that the Respondent made him no reply, and that he himself *did not wait long enough to hear one*. And again, when asked what he understood to be the object of the subsequent inquiry made by the Respondent's adjutant at the council chamber, he answers "nothing, except *to know whether there were any further orders for the company*. I did not suppose there was any sinister object;" and how then, if he believed that to be an honest inquiry to know whether there were any further orders or not, can he say that he had or has not the slightest doubt that the Respondent heard and comprehended the order as he comprehended it? He has told us what he understood by the order. He understood that it was his excellency's intention to dismiss the company altogether for that time, and to have no farther communication with them as a corps that day.

He says he has no doubt that the Respondent so understood it ; and yet he says he has no doubt that the whole object of the Respondent in sending up to the council chamber, was to know whether this were so or not. And if he and his excellency then understood that the company had already been clearly and unequivocally dismissed, is it not extraordinary that neither of them should have so said to Capt. Sargent when he made the inquiry, and that nothing should have been said indicating surprise at so unlooked for and so *disrespectful* an intrusion.

If the object of the Respondent in sending his adjutant to the council chamber was as the witness himself believes, simply to inquire whether there were any further orders for him or not, it is the best evidence in the world, that the Respondent did not understand the previous communication as the witness supposes he did. If the object was as the specification supposes, to exhibit contempt and disrespect towards his excellency, one would think the Respondent might have devised some less ambiguous expression of it than that. The inference that he acted from such a motive without better evidence of it, than is to be found in this specification and the facts proved under it is neither more nor less than ridiculous, and without a motive to point it ; the charge is neither more nor less than frivolous and vexatious.

But it is alleged as matter of aggravation, that the Respondent not only committed the heinous act, of sending up his adjutant to inquire if there were any further orders for him or not, but that he did so without making any explanation, or offering any apology, or even asking permission so to do ; and this is charged as constituting or aggravating a military offence. It is the duty of an officer doubtless to make explanation of his military conduct to his superior when required so to do. But how was the Respondent to know that an explanation was desired at that particular time, without an intimation to that effect ? If a military explanation was looked for, had he not a right to expect that his orderly would have returned charged with a summons for him, to appear for that purpose personally in the council chamber. And when dismissed without further orders, especially after the refusal of his excellency to acknowledge the salute of the company or accept the services of the sentinels detailed to protect him from the crowd ; was he not bound to consider, as his arrest closely following without any inquiry into the cause of the accident subsequently proved, that his excellency was not desirous to receive a personal explanation, or at

least not desirous to receive it at that particular time? Was it his military duty as an inferior officer under these circumstances to have intruded himself unasked into the council chamber, and to have forced an explanation upon his excellency, whether he desired it or not?

As to the not offering an apology or asking permission so to do, the Respondent will presently consider that subject more at length. For the present he contents himself with considering it strictly in connexion with this specification; and respectfully insists, 1st. That the not making of an apology to a superior officer, may be very uncivil, but is in no respect unmilitary; it is not an offence triable by Court Martial. 2d. As matter of military etiquette, his excellency had already refused to receive the most military form of apology which an officer could offer when he refused to acknowledge the salute of his corps, and the Respondent had no reason therefore to suppose that a personal apology at that particular time would fare better. 3d. If the Respondent was bound to have made a personal apology, he was not bound to make it at that particular time. He was then in command of his company, and as an officer, should have sent his adjutant to report his readiness to receive further orders. In a military point of view he had no right to leave his command without an order so to do for the purpose of making personal apologies. The time for him to have done that, would have been some reasonable time after he was dismissed from further orders, and after he had himself dismissed his command. But whatever he might have done in that respect under other circumstances, he was very speedily not only relieved from the obligation, but debarred from the exercise of the right of making an apology by his excellency's order for his arrest, made known to him within an hour or two after the dismissal of his men. This subject has been already considered.

The Respondent therefore confidently relies upon the position that if he has not been guilty of disobeying any order alleged to have been broken in the specifications of the 1st charge, nor of neglecting any duty as set forth in the specifications of the 2d charge, nor of any unmilitary and unofficer-like conduct by reason of the matters set forth in the 1st and 2d specifications of the 3d charge, he cannot lawfully be found guilty of such misconduct by reason of any matter alleged and proved under this 3d specification of the same charge.

Having thus gone through the several specifications of charge, and applied the evidence to show how far it falls short of prov-

ing them as they are laid, the Respondent now asks the attention of the court to a view of the case wholly unconnected with any technical objections. He asks the court now to forget the precise allegations of the charges, and to view the conduct of the Respondent as if they were now sitting not as a court martial, bound to find the Respondent guilty of those precise charges on proof strictly applicable to them, or to acquit him ; but as if they were sitting here as a court of inquiry, to investigate the whole conduct of the Respondent and to determine whether the evidence is sufficient to put him on trial, to determine not whether charges made against him are proved, but whether his conduct has been such that any charges could be framed, however skilfully, on which he ought to be held to answer. And here the Respondent cannot avoid expressing his satisfaction that such an interval has taken place by the adjournment of the court as enables them to look at the merits of the question, wholly unaffected by anything which has occurred before or on the trial except that which is recorded as the basis of their judgment. The court may more easily now discharge the imperative duty of disregarding all considerations, which do not appear as a part of their recorded proceedings. If prejudice had been excited by rumors of disrespectful conduct on the part of the Respondent, of which no proof has been here offered, that prejudice now has subsided — a full and even tediously minute investigation has been made into the whole conduct of the Respondent on the day in question, and from the trifling nature of some of the allegations, and the great pains that have been taken without success to prove them against the Respondent, the court may well believe that nothing which could have a tendency to convict him of any offence has been omitted by the diligence of the Complainant.

The Respondent stands charged before the court, with much which he might very safely admit to be true ; and perhaps his unwillingness to admit anything contrary to the truth, has given to those minor accusations their only importance. The Respondent feels that he has here one matter to answer before the court and one only. He is not disposed to deny that it is a matter for which he is bound to answer : with what solemnity of form, however, and whether before this tribunal in the first instance, or whether the inquiry might have been made equally well without so much inconvenience to the public and to himself, is a question on which he presumes not to judge, and which certainly he shall not make the subject of any complaint. It is enough for him that he has a good

answer, and he makes it as cheerfully before an independent court of his brother officers, as he would have made it to his excellency himself if an opportunity had been afforded. And before entering upon an examination of the transactions which are the foundation of this inquiry, the Respondent begs leave to make a few remarks on the general principles on which officers of the militia ought to be holden amenable to courts martial. There never was a time when such considerations were more necessary. The whole system of militia discipline has just escaped abolition by the legislature; and it cannot be denied that there is a strong and growing excitement against it, throughout the whole country, at the very moment when loud threats of rebellion and disunion are sounding like distant thunder in our ears, and the wisest men amongst us cannot disguise their apprehensions of the worst consequences. At such a crisis to proclaim to the factious that we are abandoning the discipline of the militia, which alone can give any efficiency to its organization, seems little short of that madness which goes before ruin. But such is the wish of the people of Massachusetts, as strongly expressed by the popular branch of the legislature, and the cause of it can be found in nothing but in the burdensome forms by which a vain attempt is made to assimilate this necessary part of our civil institutions to the practices of a standing army. It may gratify a puerile pride to insist on that ceremonious performance of duties of mere etiquette, which necessity has alone established in regular armies, but the exaction of it is entirely foreign from the true purpose of the militia system. That purpose is solely to put the citizens into a state of preparation to become soldiers at the shortest notice, and all military requisitions upon them for any other object, are unwarrantable burdens. It is, as the Respondent has had occasion before on a preliminary question, to insist, a service of *pure utility*, which is required and authorized by the constitution and laws of the States as due from the militia. And as nothing beyond that can with propriety be required, by commanding officers, so those under their command cannot properly be called to answer to a court martial, for the omission of anything which is not essential to that end. The Respondent, stands here arraigned, among other things, for a breach of military etiquette, "all which conduct," says the conclusion of one of these specifications, "is unmilitary, un-officerlike and contrary to the rules of military etiquette and propriety," "and has a tendency," says another, "to bring the militia into ridicule, and the military forms and ceremonies of

the government on the day of General Election into contempt." This kind of complaint proceeds on very erroneous views of the true object of the militia service. If the rules of mere military etiquette are to be the standard by which the conduct of its officers is to be judged, if courts martial are to be made courts of "military forms and ceremonies" and their members are to be called from their daily occupations to inconvenient distances at a great expense to the public, lest the annual parade on the day of General Election should fall into ridicule and contempt, however much such an event is to be deprecated, the sober calculating people of this commonwealth cannot be slow to find out that the object to be gained is not worth the cost of the means. If the preservation of these "rules of military etiquette," and of these "military forms and ceremonies," is really an important part of a system which cost so much time and money to support it, it is not to be wondered at, that those who receive none of the homage of these forms and ceremonies are tired of the trouble of maintaining them. And if gentlemen who incur the labor and expense of the offices in the militia, are to be degraded by a conviction of unmilitary and unofficerlike conduct for the neglect of mere etiquette and ceremony, such offices will soon fall into the hands of those who have neither character nor honor to lose; who, however perfect they may be in "the rules of military etiquette" and the "military forms and ceremonies of the day of General Election" or of any other day, will carry with them very little of that influence of character and personal respectability which has thus far sustained the reputation of the militia of Massachusetts. It is not denied that a strict system of subordination and respect while on duty is essential to the very existence of the militia, that the wilful or negligent disobedience of orders when lawfully given and on a lawful occasion, or of duty plainly pointed out, is justly and necessarily punishable; nor that any such conduct in the performance of duty as marks a gross want of the knowledge of military matters which may be fairly required even of a militia officer, much less that any conduct in the performance of duty which would on other occasions degrade the character of the individual exhibiting it, should be followed by military censure. But to cases of this nature clearly developed, the jurisdiction of militia courts martial is to be strictly confined. The moment they attempt to pass beyond them and to adjust the personal controversies of individuals, or to enforce the observance of the mere formalities and ceremonies of parade, they

enter upon ground which they cannot be expected well to understand, and leave behind them those considerations of utility which alone make the system respectable in the eyes of respectable men.

The court must be well satisfied from what has been said that this is no case of breach of orders. It is therefore quite immaterial to inquire in the view of the case now proposed to be taken, under what orders, if any, the Respondent acted. Though it may be worth while to remark that no breach even of the most express orders, can subject an officer to censure, unless where it has been occasioned by wilful disobedience or culpable neglect. And the Respondent here begs leave to impress it on the minds of the court that the proper object of their inquiries is as much the motives which led to the conduct complained of as the conduct itself. He is charged with wilful and contemptuous conduct, and although it has been suggested that these are mere words of form, the Respondent wholly denies the truth of such a suggestion. They are most substantial and necessary words, necessary to be used, and necessary to be proved. This is a criminal proceeding against the Respondent, and like all other criminal inquiries to be determined by the intent of the party. If the court find the facts charged to be true, and that they occurred from the motives of wilful contempt and disobedience to which they are ascribed by the complaint, it will undoubtedly be the duty of the court to convict the Respondent; but if the proof, either of the fact or of the intent, fails, the charge fails altogether. Suppose the court are satisfied by the evidence that every fact charged here is true. Suppose they find it true that the Respondent marched his company from the meeting-house door without leave, but without any intent to withdraw them from the further service of the day, or to exhibit any disrespect to the commander in chief, would that be a sufficient cause to convict the Respondent on any of these charges? Suppose it to be true that he left the governor to wait at the meeting-house the full time alleged by Col. Quincy, but that it happened accidentally and by no intentional disobedience or negligence; can you convict the Respondent on any of these charges? Suppose it to be true that in his earnestness to repair the accident he hurries his company up Bromfield's Lane even in the most unmilitary manner. Suppose the men had left their ranks and hurried each by himself to Tremont Street and there formed and in due order, or even in such imperfect order as the haste of the moment permitted, to receive the governor on his way and offer

to escort him. If all this, however irregular, was done in good faith, and with a sincere desire to show respect and not disrespect to his excellency, is it to be pretended that the officer can be found *guilty* and punished? *Guilty of what?* Guilt implies a design to do wrong, or a wilful neglect to do right. If an officer of the militia is to be found guilty of unmilitary and un-officerlike conduct, simply upon the fact that his command is at any moment on the march or on parade not in strict military order without proof of culpable intent or negligence on his part, is there an officer in the whole militia, nay, is there an officer in the army that is not constantly obnoxious to it? The court will undoubtedly perceive that what is really the whole substantive matter of these charges, though the Complainant calls it mere matter of inducement, is the intent with which the acts specified were done or omitted. The Complainant probably has not so far forgotten his early pursuits as not to know, that no indictment for a crime is good at law, which does not allege a criminal intent, even where the offence charged is one of those moral delinquencies which the law calls *malum in se*. To suppose that the intent is mere matter of inducement, where the act complained of is one which derives its whole criminal character from the direct injunction or prohibition of law, and is in itself of a perfectly innocent character, is a doctrine as new as it is dangerous, standing upon the authority of the Complainant alone, and not likely to be adopted by the court under the advice of the learned judge advocate. It has already been remarked that the Respondent feels that he has one thing and that only to answer before this court; and that is, his omission to be in readiness at the church door to receive the procession at the precise time of the close of the services. This is the only fact charged which he considers at all material for him to answer; all the others have died a natural death in the course of the examination; they have been shown to be as utterly unfounded in truth, as they are trifling if true. But that the court may come to the examination of the main point, with the more confidence that it is the only point, the Respondent will briefly examine the other allegations. And it will be difficult to do so, without expressing some indignation at such an attempt to oppress and bear down the Respondent by a multitude of groundless accusations, in hopes that the number of them might stand in the place of proof. Facts are charged against the Respondent as distinct offences, which any man of the least military knowledge must well know, if proved, are wholly immateri-

al. Facts for which, however well proved, if a court martial in the regular army and in actual service should convict and punish an officer, every member consenting to the sentence would be immediately liable to an action in a court of law for a wanton abuse of power.

The first charge upon the Respondent in the order of events, is, of this character. It is to be found in the 3d specification of the 1st charge. It is, that after delivering the escort at the door of the church, the Respondent was on the march with his said company away from said meeting-house without leave, and the same accusation is repeated in the 1st specification of the 3d charge. Such serious attempts have been made to prove this on the Respondent, as show that this was not reckoned by the Complainant, like the whole intent and motive of the Respondent, mere matter of inducement, but a substantive charge. Now suppose it to have been true in point of fact (as it is proved by unquestionable testimony not to have been,) would it or would a hundred such things put together be worth a moment's consideration? There was not even the least impropriety in it. The procession had been delivered; it was well known that they were then to attend divine service; it was no part of the duty of the Cadets to wait before the meeting-house, nor to go into it; they were to escort the procession there and back again and do nothing more. The whole evidence proves that the orders given at the church door are unmeaning formalities, because they are never given as they are expected to be obeyed; to report in half an hour or in an hour equally means, according to the testimony of the Complainant's witness, to be ready at the conclusion of the services, whether they last a half an hour or two hours, to escort the procession back, and it certainly means nothing more. It would be difficult to bring the obligation to wait for such an order within even the "rules of military etiquette and propriety," uncertain as they are, and though it may be one of the "military forms and ceremonies of the government on the day of General Election," it is one to say the least of it, of very little importance, and not likely to be *brought into contempt and ridicule* by the breach of it. Again, it is alleged against the Respondent, that he made no report on his return to the church at the expiration of the half hour. Now this means something; it is either put into these charges as a real delinquency of the Respondent, or it is put in for a much worse purpose. And how was the Respondent to avoid this accusation? How was he to do the duty and obey the

order which he is here charged to have neglected and disobeyed? Obviously there was but one way, and that was to send Capt. Sargent clattering up the broad aisle in the midst of prayer or sermon to present his sword to the governor or to Col. Quincy, and to inform them that the Cadets were awaiting orders; a measure certainly equally as well adapted to the edification of the congregation and to preserve the "military forms and ceremonies of the government on the day of General Election from falling into contempt and ridicule." If the Respondent had obeyed this order in the only way in which it could have been literally done, it would have furnished the Complainant with matter for a specification not easily answered, and yet the neglect to do so is now one of the charges against him. If the Complainant answers that *this* is mere matter of inducement, the Respondent asks to *what* is it an induction? If it is an induction to nothing, if it leads to nothing, as it clearly is nothing in itself, then the Respondent asks why was it inserted in the charges, but to multiply accusations that were neither relied on, nor expected to be proved, in the hope that being accused of much, the Respondent might be judged guilty of something. We now come to another accusation much insisted on in evidence, and which the Respondent cannot but feel to be as unjust as it is unfounded. The charge of a disorderly and unmilitary manner of running through the streets results from the whole evidence, and without any contradiction, in a march at double quick time, in the manner authorized and required to be taught and practised by the regulations for infantry, at a time when the Respondent was exercising a separate command, and for the very purpose for which such a movement is ordered. The mode of executing this, whether by files or in open ranks of sections, or in any other manner, is a question of mere discretion under the circumstances, if the uncontradicted testimony of experienced officers of the army is to be credited, and the movement itself is a perfectly proper and usual one, either to arrive on parade, to engage an enemy, or even to escape the severity of the weather according to the same testimony. Two men lagged behind for a short distance on the slippery ground (as Gen. McNiel testifies, always is the case with some even on a slow march,) and joined the company at or before the halt in Tremont Street. This is the whole evidence on this point. And now the Respondent asks again, why is this charge made against him? This cannot be called matter of inducement, and to say that it is completely refuted by the evidence, is saying far less than the

truth. It has never been put in a condition to be refuted. There is not a pretence that it is true as a proper matter of charge, or as anything but an exercise of the company in a requisite and necessary part of infantry drill; and a movement usual on such occasions among the best disciplined troops. Now the person who preferred this charge, either knew the facts or he did not. If he did not, it was either because he was not informed at all about them, or he was misinformed. If he were not informed at all he was guilty of gross negligence and injustice in making the charge without such information; if he were misinformed, why is not the informer brought here as a witness to support the charge? If he knew the facts, there is another dilemma for him; either he did not know what is unquestionably true, that the subject of the charge was a perfectly correct military movement, a part of the regular infantry drill, (and of such ignorance it is impossible to suspect any person with whom this charge could have originated.) Or the charge was wilfully made with the knowledge that the Respondent had been guilty of no such offence; a matter equally impossible to be suspected. But how the Complainant is to escape without falling on one of these conclusions, is a difficulty which the Respondent is not called upon as part of his defence to solve.

The next of these accusations, is that most extraordinary one of intercepting and impeding the governor and the procession in their course to the State House. Without repeating the manifest failure of the evidence to prove that fact, as well as the supposed disorderly state of the company at the head of Winter Street, (a matter by the way nowhere alleged in the specifications, and therefore, if true, wholly immaterial;) what is the substance and meaning of this charge? Suppose it were true, as Col. Quincy alone has stated, and certainly must have dreamed, that in hastening into line, some of the members of the Cadets had intercepted his excellency, and actually caused him to turn aside from his path; is the Respondent to be held personally responsible for this without any proof that it was by his encouragement, permission or default? Is the captain of a company to be answerable before a court martial for every irregularity committed by one of his men? Is it not necessary to connect such a fact in some way with the personal conduct of the Respondent? Does it not all come at last to the question with what motive was the Respondent hastening to intercept the governor? Whether it was with a view of repairing an involuntary error, or of insulting and jostling him in the crowd?

As to the mere fact independent of the motive, the Respondent is incapable of imputing to his excellency any feelings which could make it in his eyes an offence, to come accidentally in contact with his person, even on such a public occasion, still less that it could be his wish to visit it on an individual who had no personal agency in it, by a measure adopted hours after any momentary irritation must have subsided.

The remaining facts of which the Respondent is accused, are of a like nature ; reprehensible, if intended as disrespectful, but certainly not such as carry in themselves any intimation of such a motive. Marching up Park Street in rear of the governor, and sending up his adjutant for orders, as mere facts, are not worth discussing ; and whether they proceeded from a disrespectful feeling and were intended to exhibit it, must be judged by the manner in which these acts were performed and from the whole tenor of the Respondent's conduct on that day, and to that inquiry the Respondent will now ask leave to direct the attention of the court. And if it shall turn out on that examination plainly and manifestly that there was no appearance of intentional disrespect in the conduct or manner of the Respondent, and that not even one of the witnesses of the Complainant including the Complainant himself thought so at the time, or testifies so now, then the Respondent asks the Complainant what motive led to the suggestion of these charges, which can be here avowed and defended ? Now follow the Respondent from the moment he makes his first appearance at the State House at noon, until he is finally dismissed at the same place, and what evidence of any want of respect for the executive does it exhibit. The Prosecutor is bound to make out in justification of his charges, a case of more than mere suspicion, but he is defied to produce even such a suspicion entertained at the time, or the slightest cause for it since. After incurring great expense and taking unusual pains, first to hasten the transmission of the general order, sending out his own company orders in anticipation of it, and next in procuring by his personal solicitation and with great difficulty a respectable number to escort the governor. The Respondent first presented himself and his company to his excellency by invitation at the council chamber. Is there suggestion of any but the most respectful conduct there ? Not the slightest. The Respondent then did not enter upon the day's duty with any intention to insult the executive. When was the offence given or imagined, that called up such an unworthy feeling as the Complainant ascribes to him ?

When the procession was ready to move, his excellency, instead of being received with the stinted courtesy which such a feeling would have dictated, was saluted with more than ordinary marks of respect. By the express orders of the Respondent as testified by the drum major, he was received with a full march from the band, instead of a single strain as had been usual. Did this look like intentional disrespect? The procession was escorted and delivered at the church with the usual honors, and though the weather was intensely cold not a jot was abated of the customary forms. From the door of the church the company was moved just so far as to relieve the men from standing in deep snow, and then halted to receive the further orders of the governor. From that time until the close of the services, nothing occurred that can have any bearing on this question. That proper and usual precautions were taken to be ready to receive his excellency at the church has been already and will be further shown on other points of the defence. What is the next act of the Respondent after being notified of the approaching close of the services? An instantaneous movement without even waiting for the men who had left their ranks; a forced march to the church, just avoiding the unmilitary offence of double quick, although there was no reason to expect that such haste would be necessary. Was this the anxiety of disrespect? Did the Respondent thus hurry forward that he might be in time to insult the governor as he left the church, or that he might not by any accident fail to render him the usual honors of the day? Arrived at the church he found the governor had just left it. Here then was the occasion, if any, on which the feeling of resentment and disrespect might be supposed to have arisen in the breast of the Respondent. Though less than one quarter of the usual time had intervened between the end of the sermon and the close of the services, and though his excellency well knew that the intensity of the cold was such that a long exposure to it might have been fatal to frames like those of many who had volunteered to do him honor; he found that his utmost diligence and haste had been anticipated by the rapid movement of the governor which had left him in a mortifying state of delinquency. If the Respondent was capable of the feelings and motives ascribed to him by the Complainant, was not this the moment when they would have been displayed in some look, word or action, which might have been proved to the court? Would he not, if he had allowed himself to be influenced by such feelings, have turned on his heel marched his company

to their armory and left the governor and procession to end their walk as they had begun it? Did any one even hear a hasty expression of impatience escape him at this disappointment? No ; without a moment's pause, he pursued the same course to repair the mistake that had been adopted with success and sanctioned by the executive on a former occasion. Proceeding rapidly after the procession and taking a shorter path, at the quickest military step, but without disorder, he was enabled by great exertion to get his command into line to receive the governor at the head of Winter Street, and there offer him the escort of the company. The movement was executed in haste and the governor knew it must be so, but it was executed according to the strong preponderance of the testimony in military style, and all but the honors of the music were duly offered to his excellency as he approached. This omission can by no perversity be ascribed to the Respondent, for the drum major testifies that he had general orders from the Respondent to pay those honors whenever the company presented arms to the governor, and it was his fault alone that the music were not in line and did not play a march. The Respondent having thus done all in his power, in the best manner the occasion permitted, as he thought then, and as he thinks now, to repair the accidental error committed, and meeting no return or acknowledgment of his offered salute from the governor, who passed rapidly by him without any notice but sending his aid to dismiss him from further attendance, (an order which, as delivered by Col. Quincy, the Respondent solemnly avers on the word and honor of a gentleman that he did not sufficiently well understand to venture to act upon) and the offered services of his sentinels being uncereemoniously rejected, he marched his company up Park Street at a considerable distance in rear of the governor and in no disrespectful manner, and having halted in front of the State House sent up his adjutant to ask the farther pleasure of his excellency. The message was delivered by Capt. Sargent in a respectful manner, and Col. Quincy testifies, that notwithstanding he feels confident now that the Respondent understood the order communicated to him in Tremont Street, he then understood and believed that the only object of the message was to learn whether the governor had any further order for the Cadets, and did not suspect that it originated from any sinister motive. The adjutant having communicated the answer of his excellency to the Respondent, the company was marched to the armory in the usual manner and dismissed. And thus ends the history of this day

of alleged disrespect and contemptuous behaviour on the part of the Respondent. And do the court see in all or any part of this proof of intentional conduct of that description? The Respondent puts it to you all, and to each of you as officers and as gentlemen, on your oaths and on your honors to say, whether you believe from anything you have heard in this room (and surely you will not presume to judge by anything else) that he designedly exhibited on that day the slightest want of respect towards the executive, personally or officially. You do not, you cannot believe it. If it be not so, all the transactions charged on the Respondent from the moment the procession left the church are utterly without force as charges of misconduct, if ever so amply proved. And there remains but one more inquiry, and that is, whether the Respondent was so culpably negligent in not being at the church door at the conclusion of the services, that however he may have intended to do the usual honors of the day, he is nevertheless subject to your public censure.

But before taking a more general view of that question, there are some circumstances connected with the point of intention to which the Respondent will advert for a few moments. Much is said in the specifications about the want of an apology which it is supposed the case required; and the conduct of Col. Williams and Col. Baker on similar occasions, has been introduced by the Complainant probably with a view of contrasting it with that of the Respondent to his disadvantage. And perhaps some use is to be made in this view of the letter of the Respondent to his excellency. To these points an answer must be made by anticipation.

It is in the 2d and 3d specifications of the 3d charge set forth against the Respondent, in one that he made to the governor no explanation or apology, and in the other that he "neither made explanation nor apology, nor even asked permission so to do." Now the Respondent freely admits that for an omission like that which unfortunately occurred on Election day, however involuntary, an officer should make a suitable apology if opportunity to do so is afforded him by the person to whom it is to be made; but if that person immediately requites the omission by a cold repulse of all offer of such reparation as the case admits, before it can be ascertained whether the offer is, or is not to be preceded by an apology, the Respondent conceives that the duty of an apology is quite dispensed with, by such conduct. And in admitting it to be a *duty*, he means it only as a duty of

courtesy and not of military obligation. There is no rule or article, nor any military usage requiring an apology in such case; it stands precisely on the same grounds as all questions of courtesy between gentlemen, and may be dispensed with in like manner. It is doubtless his excellency's right to pass by without notice, any military offence however heinous, provided a suitable apology is made to himself, and he may equally well pass it without any. But the making or declining to make such apology does not prevent an act or neglect from being, nor cause it to be a military offence; if it was so before, an apology cannot make it cease to be so; and if it was not so, the want of an apology cannot make it so. This court therefore being appointed to try the Respondent only for military offences, has nothing to do with the question whether an apology was or was not made to the governor; the question is, has an offence been committed against the commonwealth by breach of orders, neglect of duty or unmilitary conduct. The only bearing the question of apology can have, is to show the intent of the Respondent, and on that point he cheerfully leaves it to the court to say whether after the reception he met with in Tremont Street, the want of subsequent apology is any proof of intentional disrespect, when weighed against his obvious efforts to repair his involuntary mistake. Whether to make an apology or not is a matter of which he claims the right to judge entirely for himself; by declining to do so after the repulse he met in Tremont Street, he is aware that he gives up all claim on the favor of the executive, and places himself and his cause entirely on the rectitude of his own intentions and actions; but he desires to stand on no other ground before this court. And if that ground will not sustain him, he will think it better to fall than to claim any other support. He begs however not to be understood to complain of the conduct of his excellency which prevented his apology at the time; so far from this, he views it without any dissatisfaction as the exercise of an undoubted right on the part of the governor, as it is his own right still to make or withhold an apology under such circumstances. One thing however he is charged with omitting, which he should never do under any circumstances nor to any man, and that is, to "ask permission to make an apology;" if the omission of such unmanly subserviency is really conduct unbecoming an officer, the worst sentence this court can pass on the Respondent will be easier to bear than to continue to hold his commission. He would willingly quit a station which does not allow him the right even of making an apology for un-

intentional omissions without the gracious permission of offended authority. If any one wishes to know what things have brought the militia into disrepute, such a charge as this, preferred by such authority, is answer enough.

The Respondent acknowledges as much as any man the respect due to constituted authorities, and he trusts he feels as much as any man, the propriety of making suitable reparation of all voluntary wrongs, and suitable explanations of all accidental errors, but he trusts too that he shall always take care to do so without sinking quite so low as to sue for permission to make an apology which has once been abruptly rejected. But Col. Williams, it is said, and Col. Baker thought proper under similar circumstances to make the most earnest and ample apologies. Of such things each one must judge for himself; but the circumstances in the case of Col. Williams were very widely different from those of the present case. In the first place, there was no such reason then, for withdrawing the company from the church as the inclemency of the weather on the 4th of January; next there was obvious and sufficient cause to lead the governor to suspect that the neglect was intentional and pointed. He had just been superseded in office at a time of high political excitement—when it was hardly thought by one party, respectable to be seen in company with an individual of the other. The governor had become exceedingly obnoxious to the federal party, and so high was the known federal feeling of the Cadets, that no man suspected of democracy could have remained a day in the ranks. No wonder that a man of generous feeling like Col. Williams should for these reasons be earnest to clear himself and the corps of the suspicion of an intentional and wanton insult to age and authority. But could the present governor for a moment suspect any such intention on the part of the Respondent or his corps? there was not the slightest ground for it—no such suspicion was in fact entertained as amply testified by the Complainant's witnesses, and among them one of his excellency's staff. And how was Col. Williams received by Governor Gerry even under all the smart of such a suspicion? Col. Austin testifies that attending as his aid he asked the governor if he had any orders for the Cadets as they approached; "*wait and hear what they have to say,*" was the answer; and he did wait and gave Col. Williams opportunity to explain and apologize, and then accepted his escort and anxiously endeavored by a most flattering general order to relieve Col. Williams's mind from the mortification he felt. If

the Respondent is obliged now to contrast with this conduct of Governor Gerry that of the present chief magistrate on an occasion exactly similar, but attended with none of the irritating circumstances that might well have excused in that case a hasty course on the part of the governor, but on the other hand with circumstances of great difficulty and inconvenience to the Respondent and his corps from the extreme severity of the weather, which could not be unknown to his excellency, he does it very unwillingly, and purely as a necessary measure of defence imposed upon him by the introduction of this evidence on the part of the Complainant. Again he protests that he prefers no complaint against his excellency, and desires now, as on all occasions he has desired, to treat him with all the respect due to his high station. But when it is objected to the Respondent that he did not act as Col. Williams did, he must give the true reason for it, by saying that Governor Lincoln did not act as Governor Gerry did. Governor Gerry waited with calmness under all his irritation for the approach of the Cadets, and gave ample opportunity for explanation and apology. Governor Lincoln, from the moment he observed the Cadets, changed his course to avoid them, and passing their salute without notice, rendered it by the abruptness of his motion absolutely impossible for the Respondent to approach him. While the company stood in the posture of respect with presented arms, the governor without a moment's pause in his hurried course, noticed them only by sending his aid with an order to dismiss them. Was there anything disrespectful in the manner in which the company was drawn up to receive him? quite the contrary; how much more respectful was it than the mode adopted by Col. Williams, who pushed by the procession, and without permission or salute formed in column in front of the governor in the order of escort. What could be more natural for the Respondent to expect than that the governor, seeing the company before him waiting his approach in the order of salute, would pause as he reached them to receive any communication from the Respondent, or to ascertain that none was intended, before he passed them without the notice even of a look. The only further attempt which could be made to be serviceable to his excellency by sending sentinels to attend him, and protect him from the crowd being also repulsed, it seemed to the Respondent that nothing more remained for him to do than to make sure that his services would be no further wanted or accepted, and this he did in a respectful manner, and then withdrew his company.

Now the Respondent asks of the court whether this is a case parallel with that of Col. Williams, and whether the conduct of that officer affords any rule for that of the Respondent under circumstances and with a reception so different. On Col. Baker's case, the Respondent feels unwilling to make any remarks for several reasons, but one is enough, and that is that Col. Baker has testified that he had violated no order and had neglected no duty, having been expressly dismissed for an hour, and that hour not having elapsed when the governor returned to the State House. Under such circumstances the apology that may or may not be made, the resignation of commissions or any other ceremony is a mere matter of taste about which there is no disputing. If Col. Baker preferred it, there could be no objection surely on the part of any other person, but the apology that is made, where there is not even an accidental error to apologize for, can be of very little weight as a precedent for other cases. Col. Quincy indeed testifies that Col. Baker was delinquent, as the hour had elapsed before the governor left the church; but if that were to be relied on, it would not at all affect the case, so long as Col. Baker did not think so nor act upon any such supposition.

One circumstance more is to be remarked on upon this point. The letter of the Respondent may have been introduced to show a disrespectful intent on his part, as such was rumored to be its character. If the language of that letter had been really offensive, though it might perhaps have been properly made a distinct subject of charge, it could have but little effect, being written immediately after the arrest, to explain the Respondent's feelings before that measure; but as it is even under such circumstances perfectly respectful, though as might be expected, not quite so coolly or carefully expressed as it would have been at another time, it affords irresistible proof that the Respondent had been actuated during the day by no improper feelings towards the governor. Though it solicits no favor and offers no apology, for which that surely was no time, it contains a plain and temperate statement of some of the leading causes of the failure of the escort: causes which are now abundantly verified by proof. The Respondent hopes that the court will carefully and candidly examine that document, and he has no fear that it can prejudice his defence. And if the court have heard idle rumors maliciously circulated to the injury of the Respondent, let them look at that letter as the subject of the worst of those reports, charging the Respondent with writing an insulting

letter to his excellency, and by this example judge of the character and truth of the rest.

The whole inquiry then before the court is plainly reduced to this: Was the Respondent, though with the best intentions, so culpably negligent in being absent at the conclusion of the services, that he ought to be convicted of neglect of duty? Now it is apprehended, that to justify such a judgment under such circumstances, a case of gross negligence must be clearly made out to the full satisfaction of the court. It must be not an error of judgment, but not judging at all; not a mistake, but an utter carelessness of duty. Now the Respondent asks the court with great confidence whether his conduct as proved here was careless or negligent? Is it proved that for a single moment during the service, and after the half hour's leave of absence had expired, he was occupied with anything but the duty assigned him? There is no suggestion of it. Did he not remain before the door at every return, as long as he could with propriety and safety keep his men standing under arms? Dr Warren states that fifteen minutes was as long as it was safe to do so; his opinion requires no confirmation, but might if necessary have been confirmed by any number of medical witnesses. Did the Respondent act on his own judgment alone in withdrawing for the last time from the meeting-house? He was advised by some of the audience and by the constable, who best knew the usual course of such services, that he might safely be absent. Did he omit any proper precaution to be duly notified of the approaching close of the services? Two athletic messengers were left to start with all speed the moment the sermon drew to a close, and not a moment was lost in answering the summons. Every man was ordered to keep his post while waiting for it, and the two who had left the ranks did not delay the company an instant; the mere accident of shortening the service prevented the arrangement being perfectly successful. And even that accident would have been wholly repaired by three minutes' patience on the part of his excellency. The evidence on that point has been already stated at large, and the conclusion is irresistible. Now what are the real merits of this question? The Respondent was placed in a situation in which he was obliged to exercise a discretion. The necessity of choice was forced upon him by circumstances which were imperative. No less than the lives and health of his men. And he must be judged according to the principles of law and of reason applicable to other cases of a similar nature. The rule of law is, that where

an agent is forced by circumstances or by the nature of his employment to exercise a discretion, all that can be required of him is reasonable care and diligence and a competent knowledge of his business. He is not bound to show that he did the very best thing that could be done, nor that nobody else could have done better. But the Respondent would feel no apprehension if a much stricter rule were applied to his conduct. What could he have done better? As to waiting before the church door, he could not; he ought not; if he had done it, he might now fairly be answering before this court under the first of the rules and articles, for wilfully oppressing and injuring those under his command. Suppose he had done so; is it not in evidence before you, beyond the possibility of contradiction, that the certain consequence would have been frozen limbs, sickness and death among the corps? Now what can be said against this, but a display in that answer, of that sort of muster-day heroism which sees military glory in standing in the heat or in the cold, merely to show that it can be endured; and in encountering the unnecessary perils of a puddle, rather than turn aside to march on dry ground. We may hear about the stern duty of a soldier to be regardless of personal suffering in the cause of duty, and a loud penny trumpet may be blown about martial deeds and martial endurance.

"*It is sweet,*" says the poet, "*to die for one's country.*" Such is not exactly the creed of these heroes; but they think it very honorable to freeze their fingers or wet their feet whenever the martial glory of the country, or in other words, "the military forms and ceremonies of the government on the day of General Election" call for such a sacrifice. Sir, if such men had ever seen any harder service than that of a review, or encountered any greater military perils than those of a sham-fight, they would know that it is the duty and the *first* duty of an officer to accomplish what is required of him, with the least possible suffering and exposure of his men. The proudest reward that the great captain of the present day ever received, was the thanks of parliament for his care of the lives and health of the soldiers committed to his charge. He had titles, pensions and estates for his victories, but he had the thanks of his country for sparing the blood of her children. Now what was the occasion which called on the Respondent to expose his little command to danger quite equal in proportion to their numbers, to that of a general action? This is no exaggeration. It is an old remark, that the mortality of a camp is greatly

more destructive than that of battle ; and that mortality arises almost wholly from unnecessary exposure and imprudence. If the first medical and surgical authority of the city, perhaps, and it might be said of the country, is to be believed, as to the danger of exposing such men as the Cadets, during the hour and one half which intervened between the expiration of their leave of absence and that of the services, the company might with less probability, and amount of loss, have encountered a pitched battle in the field, for the ordinary chances of battle would hardly have taken off a man from such a number ; again it is asked, why was this risk to be encountered ? for no reason but to prevent the governor of the commonwealth from waiting three minutes in a comfortable church, until his escort could arrive. But it is said that places were prepared for the company, and they should have gone into the church. It has not been done these twenty years, and as far as appears, it never was done on Election day ; and if that be required now, no efforts will be able to bring out an escort for such service. With the greatest difficulty, the Respondent, by buying uniforms at his own expense, and by personal solicitation, even among the students of Harvard College, persuaded a number barely sufficient, with an equal number of musicians to make a respectable appearance to do the escort and collation duties of the day. If to those had been added the more arduous services of the church, the Respondent submits it to the court, whether the escort would have been such that its failure to be at the church door could have been a subject of much regret to his excellency. In plain terms, no escort of the Cadets could have been had on such conditions, and if the Complainant thinks *that* a criminal disregard of their high privileges, the court will remember that it is the Respondent and not the corps that is on trial ; and that he is not responsible for the lack of that which the corps never yet has done, or is under no obligation to do, and which he has no legal power to coerce.

Again, it is suggested that the company might have gone to the Mansion House. The keeper of it tells you he keeps a stage house, and could not and would not have received them ; he could not have done it with credit to himself or comfort to them, and he should peremptorily have declined, if application had been made to him. The Respondent knew what were the accommodations and occupation of the house, for it belongs to members of his own family, and he knew it to be an unsuitable place. The landlord says, he would not have turned them

from his door if they had been suffering with cold ; that he would have extended to them as he would to anybody, the common duties of charity, and of humanity, but he would have received them on no other terms ; whether these are terms on which the governor's body-guard, engaged in his personal service, should be suffered by him, or suffer themselves to be received, is a question which requires no answer. If the executive, in whose service they were engaged, forgot their sufferings in that intensely cold day, and made no further provision for their relief, than to permit them to be absent from the door half an hour out of the two hours' time of service, the Respondent respectfully suggests, that he had a right to make such provision for them and himself as he thought their necessities required, and the least that could have been expected by him, in case of such unforeseen accident was, a patience somewhat proportioned to the difficulty of the situation in which he was placed, or an easy acceptance of the best reparation he could offer for an error so unintentional and slight.

Sir, there does seem to the Respondent something in preferring such charges on such an occasion, and for such an involuntary omission, not quite consistent with the usual mildness and justice of his excellency's character. If the Respondent could permit himself to take such ground, in his defence, might he not appeal with great force to the feelings of his excellency, and ask for what fault of his own or of any connected with him is this disgrace attempted to be fastened on him and on his name ? But, sir, the Respondent feels that a different course is more becoming to himself and to the occasion, for he knows that it is a case without parallel in the records of military courts. The Complainant has not shown, and he could not show a case in which an officer in any service, has been convicted and degraded for an error so manifestly, so confessedly, accidental, and without the slightest proof of any improper intention. And why he should expect such a judgment to be visited on the Respondent he is at a loss to imagine. If such a judgment can be wrung by the hand of authority from a military court, this is likely enough to be the last court of officers that ever will sit in the commonwealth, to dispose of the commission and honor of a gentleman. Another year will not pass, before an act will pass either to take away all occasion for such investigations or to transfer them to some more independent tribunal ?

But, gentlemen, such is not the expectation of the Respondent ; and he has not addressed you under such apprehension ;

he has conducted his defence, and he now addresses you with the freedom of a man, who is sensible of his rights, as well as of his duties. He has not shrunk from any topic of defence for fear of alarming official pride, and the last word he has to say to you is, that he stands here for judgment on his rights, and not on the favor of any man. But the court and the Complainant very much mistake the temper of the Respondent, if they suppose him in the least degree indisposed to submit most respectfully to the authority of the tribunal before which he stands. He does that tribunal however, the justice to believe, that nothing is to be gained before it, by any unmanly surrender of his own rights or character. The law has given to this court great power over the Respondent, and he cannot be insensible of it; but it can by its extremest judgment take nothing from the Respondent so valuable as that, which he must voluntarily surrender, before he can become a supplicant for favor.

No, sir, he addresses this court as gentlemen and men of honor should be addressed — with a firm confidence in their independence and integrity. If he thought them, or any one of them of a different character; if he could think any one of them base enough to come here with a mind predetermined to convict him, or weak enough to yield to the influence of the brief authority arrayed against the Respondent, such a member of this court he would not address at all; not even in the just language of reproof; an exposure of such conduct by the Respondent would be unnecessary; and no language that he could use would deepen the stigma that must rest on the man thus prostituting his office, for fear or favor.

Gentlemen, the Respondent now leaves his commission in your hands; for it must either be restored to him by an acquittal, which must give it new value in his estimation, or it must be taken either away, or rendered worthless by a conviction. The law requires if you find him guilty, that your sentence be either a reprimand in orders, to be administered by the officer by whose direction these charges are preferred, for an alleged disrespect to himself, or a removal from office, with a disqualification for the future. And whether these, or either of them, are reasonable measures of punishment for anything which has been proved against him, he submits to you, Mr President, as an officer and a man, and peculiarly responsible from the station you now hold. He submits the same question to you, gentlemen, members of the court, collectively and individually, with confidence that you will do justice, according to your honest

convictions, neither sparing the Respondent if he ought to suffer, nor sacrificing him, lest others should suffer by his acquittal.

GRENVILLE TEMPLE WINTHROP.

The court adjourned to meet on Thursday morning at half past nine o'clock.

THURSDAY MORNING, APRIL 12, 1832.

The court met pursuant to adjournment.

Present, Brig. Gen. Wm. Peck, President. Col. Thomas Davis, Col. Charles Lane, Lieut. Col. Abijah Ellis, Lieut. Col. Luther Eaton.

The Respondent was called and answered.

The Complainant was called and answered.

The Complainant read his concluding argument to the court, it is annexed and marked (17) as follows :

(1 7)

MR PRESIDENT, — Before proceeding to the *merits* of the charges themselves, the Complainant begs leave to remark upon the position taken in the replication to his answer to the Respondent's objection in a preliminary stage of the proceedings, (and which the Respondent has referred to in his defence just read,) *that the governor had no power to order out the Cadets on Election day.*

If the Complainant fully comprehends the replication of the Respondent, there is no single principle in it that was not advanced by him in his original objection to the evidence the Complainant offered, though he may have added force to that objection by further arguments or new illustrations. The Respondent seemed to think he had a *right to answer* the argument against his objection, and this was admitted by the court. The Complainant had before supposed the rule to be in courts martial (where the proceedings are all in writing, and which may be kept open forever if too much indulgence is granted,) that, having the advantage of an impartial advising officer in the judge advocate, when an objection was offered to evidence and an answer made thereto, unless that answer introduced new matter, no replication would be allowed by the court; and that when allowed, the replication should be confined to such new matter. The court, however, having permitted the Respondent to go further in the present case, on the ground that

important constitutional questions were involved in the inquiry, and to comment, as he would in a civil court, upon the weight of the Complainant's arguments and the propriety of his illustrations, he found it necessary to ask the indulgence of the court for the vindication of his positions and illustrations, on what, from the consequence which has been attached to it and the time allowed for its discussion, must, now, certainly, be considered an *important constitutional question*. The opportunity to do this which was then granted, and which the Complainant as yet has had no time to improve, he will now embrace, (not for the eye of the court which has already decided the question, but for that of the approving officer, who has been addressed on this head in the Respondent's defence, in as general terms as the case will admit, without referring to the authorities which are controverted but in a few instances.)

But, before proceeding to the argument, the Complainant thinks it necessary to disabuse the mind of the court from the impression made upon it by the Respondent's replication, in which the escort is considered as a *personal escort to the commander in chief*, the order for which was founded upon a claim of right to this *personal attention*, as an incident to his office. The *terms* of the order are referred to in one part of the Respondent's argument ; but are not alluded to, except in a mistaken view, in this. Lest we should dispute about points which are not in issue, it becomes necessary for the Complainant here to inform the Respondent, that there is no such order requiring the Cadets to escort the *governor* to the church on Election day, and that no such claim is set up by *him* as the Respondent's argument supposes ; but that the order referred to required the Cadets to perform escort duties to the *government*. The terms of the general order for this occasion were like those which have been used on all other similar occasions, from the first on record, there being no order in them, according to the Complainant's recollection, from which the escort on Election day does not appear to have been ordered for the *civil government of the commonwealth, and not for the governor personally*. The escort, therefore, not being *personal to the governor* ; but, coming within the "right of an escort of honor," admitted by the Respondent, "*to be incident to the powers of civil government*," saves the Complainant the necessity of distinguishing between the supposititious cases of General Macomb and Lord Hill, and that of the governor, in the case in controversy, as being in no way applicable to the point in issue, and

of either denying or admitting the Respondent's position, that, "in time of peace, an escort is not an appendage of *military*, but of *regal rank*."

The Respondent seems to suppose that the great difficulty, in the Complainant's construction, is, that it proves too much. He says, as he has had no answer to the question from the Complainant, whether, under the construction which the Complainant puts upon the constitution, the governor would not be as well warranted in ordering the president's brigade to Worcester, as in ordering the Cadets to perform escort duties in Boston, he shall claim it of the judge advocate, and shall not be satisfied without the difficulty is met and the question answered. The Complainant owes an apology for not noticing that part of the Respondent's argument before; but, as he had only time to recur to the strong points of it, and did not think this to be one of them, he passed it unnoticed. He will, now, however, respond to the call, and admit, at once and fully, that the terms of the constitution themselves, alone considered, give the governor a power that would authorize his issuing to the president such an order. Whether it would be a discreet use of his power would depend upon the emergency which existed, and of that the governor, under the constitution, would be the judge. But, until the legislature restrained, limited or regulated the exercise of his constitutional power so as to prevent it, there is no question, that the constitution would sanction such an exercise of authority in the governor as *captain general*, any more than there is, that, as *admiral*, it would, his sending a ship to sea. If that is the case then, the Respondent says our boasted constitution is but a cloak to cover despotic powers, and the check upon its exercise by impeachment would be useless, because, when the governor had the whole physical strength under his command, the power to *impeach* would afford but little security, and the power to *rebel* would be the only remedy the people would have.

But the Complainant's doctrine does not carry him to this extent; for whenever the legislature shall perceive that the power has fallen into unworthy hands; or for any cause, there is a necessity for regulating its exercise, it will be done, and the cloak of despotism will be thrown off, and the muscles of the statute be fairly visible which will restrain it. But until then, the governor may order the troops of one division into that of another, (and it was done lately, when La Fayette was here,) as well as to order the Cadets to perform escort duty on Elec-

tion day ; it being always remembered, that any useless or improper exercise of his power will be under pain of the public displeasure, whether it be shown at the polls, in the elections of the freemen ; at the bar of the Senate, upon the presentment of their Representatives ; or by the people themselves, in open rebellion.

The power, then, of ordering out the militia on occasions other than those required by law, is one which is to be exercised upon great responsibility by the highest public functionary in the State, *and by him only*. The safety of its commission to his hands consists in this, that it can only be exercised by, through and over the people themselves, who will not by any abuse of authority "be converted into a standing army in spite of the constitution ;" nor, can it be supposed, that any governor, holding his office by popular favor, will have the folly to attempt any movement with his *own citizens*, which should aim at the subversion of *their rights*.

Another ground of the Respondent is, that the Complainant has claimed, that, as the power of the commander in chief to govern the militia is not repugnant to any other provision in the constitution, the law which should attempt to limit it, would be of *no validity* ; and thence the Respondent infers, that a power *unlimited* and *illimitable* was claimed for him.

The court, in the first place, are requested to notice, that the supposititious law is not declared, by the Complainant, *to be unconstitutional* ; but that the Complainant, in the course of the hurried, and unrevised reflections he made, in the single day allowed him to reply to an elaborate constitutional objection, drawn up and well matured before the sitting of the court, for aught he knows, but certainly done with great ingenuity and ability, only noted the point which occurred to his mind as he went along, whether a *law* could take away a power the *constitution itself conferred*, and therefore contented himself with merely entering a *query* to its constitutionality, if it should be discovered, and then expressly reserved the point, by saying there was no necessity *for pushing the argument to that length*, because in his opinion, *no such law was to be found*.

The Complainant thinks the Respondent must himself be hard pushed when he is obliged to impute to the Complainant the direct assumption of what he himself called a *questionable supposition* ; and after he had expressly declined to push his own argument to the length ascribed to him, especially when the Complainant's whole argument proceeded directly on the

opposite ground. Indeed, as he progressed in the inquiry, the power of the legislature to limit the exercise of the commander in chief's authority over the militia appeared so clear, that if he had had time to have revised his remarks, before he read them in court, he should probably have erased the questionable position, which the Respondent (with how much liberality the court must judge) has made the ground of *positive assertion* that the Complainant assumed that the governor had not only an *unlimited*, but an *illimitable* power over the militia. The whole of the Complainant's argument, which will speak for itself, and which the Respondent has pushed to this extremity, was, that, as there was no law *limiting the exercise* of the power, it remained as unrestrained as the constitution gave it; but in the whole course of his paper, there is no denial of the power of the legislature to *regulate its exercise by law*; for, if there had been, it would have been so inconsistent with the rest, as to have rendered the whole argument powerless.

It may be, and is an incident to the power of the commander in chief, that he should order out the militia when he pleases; and the propriety of his doing so depends upon the purpose and the occasion. But it by no means follows, because the power is incident to his general authority as commander in chief, that it is to be exercised only for his own *personal honor*, or for his *personal honor* at all. This is a forced construction of the Respondent, which the order itself does not warrant; and the papers in the case all show that the power has never been exercised but in one single instance, and that was by governor Hancock, in 1792, when the small pox was in Boston, and he went to the General Court at Concord attended by a troop of cavalry, from Boston. In all other cases of escort on Election days, the power of the governor has been exercised with relation to the *government*, with which he is connected. It is true the governor receives the salutes of the escorts; but these are not personal to himself, as an individual; they are paid to his office and station, and are received by him for the whole government who are with him, and the people whom he serves, in the same manner as the chief officer in command, in all countries, on every public occasion, does, for the sovereign whom he represents.

The Complainant, therefore, cannot but think that this part of the Respondent's argument was intended for those who are not personally acquainted with the governor, and therefore have not the means of judging how the republican simplicity of his con-

duct and manner accords with a dignity of deportment and character which is necessary to make the office respected which the people have conferred upon him. The governor claims nothing for *himself* on these public occasions; but he, like all his predecessors, receives for the government of the people, of which he is the head, such salutations of respect as are offered by the citizens and civil authorities, and from his citizen soldiers on duty, the customary military salutes on the anniversary of the National Independence, and at the annual organization of the government, as tend to impress the minds of all who witness them, with the value of the principles promulgated in their declaration of independence, and with proper respect for the public functionaries whom the people have invested with authority under the consecrated charter of their liberties.

While the Respondent denies that any cause of long legislation can sanction an original error, he takes more pains to shew that the terms of the various acts of the legislature, which have been cited, do not give that sanction, than would seem to be necessary for one who was serious in the opinion he had expressed, and spends much time in explaining away the provisions in several of the statutes, where officers are prohibited from calling out their troops on certain specified days, "except in case of insurrection or rebellion, *or* in obedience to the orders of the commander in chief." The Complainant thinks, however, there can be nothing clearer than the legislative design, as it is thus disclosed. The legislature do not mean to prevent the officers, in time of insurrection and rebellion, from calling the troops into the field on the prohibited days, because those cases are so urgent as to demand it; nor do they mean to say that the troops shall not come out on those days, if the commander in chief orders it. The words of the last clause would be inoperative upon any other construction. Indeed, the whole provision would be unnecessary; for, as the Respondent says, in another part of his argument, (admitting more perhaps than he intended by applying it,) the governor has the direct authority by the constitution, for the special defence and safety of the commonwealth to assemble the inhabitants thereof in martial array, and to use and exercise over the army and navy and the militia in actual service, the law martial in *time of war or invasion*, and also in time of *rebellion declared by the legislature to exist*, as occasion shall require. Unless it were, therefore, for the purpose of making the special reservation of the governor's power, to call the militia out on occasions, *other than*

those named, as custom and the public emergencies should require, there was no need of any legislative action on the subject. But by provisions of this character in the laws, the legislature have placed the duty of obedience to the governor's orders, issued in the exercise of his discretionary power, precisely on the same ground it has to those which are issued in the most extreme cases of public necessity. The legislature, when several of these acts were passed, well knew the occasions and the manner in which the several governors had used the power the constitution invested them with ; and, considering the exercise of it as useful and discreet, instead of making a general restraint upon its exercise, made it special, and expressly excepted the authority by which they were willing it should be exercised again, from any implied limitation. This discretionary power is vested in the highest public functionary *alone* ; and so long as he applies it only to its accustomed purposes, and to those extraordinary emergencies, for which the papers annexed to the proceedings show it has been heretofore applied, it is presumed the legislature will continue to sanction it. But, if at any time its useful purpose shall be diverted, either from the public customary uses for which it was designed, to that of personal parade ; or, from such unexpected emergencies as have heretofore called for it, to the mere purposes of useless authority, its exercise can as easily be regulated by statute, as any other public abuse. There is therefore nothing very frightful in the power ; nor is there any complaint that it has been abused. It is lodged in one person only, in whom the public have the highest confidence, and who acts on the highest responsibility ; and those over whom it is exercised, are the free and independent citizens of a prosperous and happy commonwealth, who, from the exuberance of their liberty, are the least likely of all the people in the world, to plot against their own blessings.

In treating of the 7th article of the 34th section of the militia act of 1810, the Respondent admits, that the commander in chief *can* call out the troops on occasions of emergency, or as he expresses it, in another place, in time of insurrection or rebellion, and also, upon any other occasion of need, *for the special defence, and safety of the commonwealth*. In this the Complainant considers the Respondent, as conceding the whole argument ; for he thereby acknowledges the deposit of a discretionary authority to call out the militia, the governor himself being the judge of the extent of the need and the propriety of the occasion.

The Respondent, after having commented upon the inapplicability of *personal* escorts to the character of our republican institutions, in which nobody differs from him that the Complainant knows of, cites the orders for the escort to the civil government on the late Centennial celebration as a case coming within a principle, which, he acknowledges, is in accordance with them. He says, "whenever the civil government think a military escort necessary for their own dignity or that of their governor, they have a right to require it." The order of the legislature on that subject annexed, shows us, that the legislature voted directly, that there should be an oration delivered, and that they would attend the public services in the church, &c. And what else did they vote? that the governor should call out the troops for an escort, *and give him authority* to do so? No such thing. On this, as on every previous occasion where there has been direct legislative action on the subject, they left it to the governor to order out an escort, or not, at his discretion, by his acknowledged authority for that purpose in the constitution. The order on that occasion was similar to the one on this, and called out a portion of the militia, to escort the *government*, and not the *governor*, as the whole of the Respondent's argument mistakenly supposes. The admission of the Respondent just quoted, the Complainant thinks he has a right to consider, as a complete justification of the order for Election day, which was issued by the same authority as the other, for an escort to the same body, and under the same legislative sanction.

The disposition to give a false coloring to the Complainant's argument, which has shown itself in other parts of the Respondent's reply, particularly discovers itself in his remarks upon the Complainant's introduction of the historical facts, relating to the liberal manner in which the legislature of this commonwealth have always construed their own implied powers, as well as those which are incident to the other branches of the government. It will require something more than the satirical exercise of the Respondent's wit, to convince the Complainant of the irrelevancy to the question under consideration of the facts he stated, regarding the liberal provision which was made by the legislature for the troops called out, on the occasion of Gen. La Fayette's visit, and of the settlement of the Complainant's account for the collation provided for the escort on the last Election. These facts show, that the exercise of the governor's authority, in calling out the militia on these occasions,

had not merely the simple acquiescence of the legislature, but were such as called for their *direct action upon it*, and to an extent of appropriation (\$5000) in one of the cases, which could not be expected to receive the sanction of that scrutinizing body, without an examination into the constitutional authority of the whole proceeding.

Where does the objector find in the Complainant's argument, an *assertion*, that the collation, provided for the Cadets, at the council chamber, was paid for under the *specific appropriation of the public moneys for necessary music*, instead of from the funds of the quarter master general's department, as usual. The expression of the Complainant was, that, if any comment were necessary, upon the resolve of June 26, 1811, "it would be, that, under its provisions, the quarter master general has paid the bill of the musicians employed by the Respondent on this very occasion, and charged the same, (and the expense of a collation, which, as usual, was provided at the State House, for the company on similar occasions,) to the government, and has settled his account, and exhibited his vouchers for *these* particular items to the committee who were appointed to examine his accounts." Do not the hyphens clearly indicate the distinction, that the appropriation for the music was under the special resolve, and that for the collation, was according to an established usage? The exhibition of vouchers for *these particular items*, which the Respondent has underscored, as though that expression had some bearing on his construction, has no relation to the specific appropriation to which the expenses of either item was charged.

This part of the Respondent's argument, which takes up three pages of his reply, is a "felicitous example" of that distinguished forensic ability which can defer a judgment, by embarrassing the proceedings of a court, upon such incidental trifles as have no bearing upon the point in issue. The argument of the Respondent "claims to be his own," and bears such internal evidence of the truth of the claim, that if it should ever come under the observation of the spirits of those revered ancestors, whom we both have summoned to judgment upon our earthly deeds, perhaps, they might favor the writer of it with an opinion he cannot too much value in the management of his causes hereafter, not to waste his time upon unimportant circumstances, and his strength upon untenable points, lest it should diminish the weight of his authority on those, upon which the decision of his cause must ultimately rest. And if I also should

be counselled not to provide the collation for any company which had not had *such continued good feasting for forty years*, until after the return of the escort to the State House hereafter, I should gratefully receive the advice, not as argumentum ad hominem, as the Respondent says, but as the course which the occurrences of the late occasion would naturally suggest, as so easily uniting the faithful performance of duty with the gratification it affords, as to save any recipient of the public bounty, hereafter, the necessity of protesting against any misapplication of the public money by which it was supplied.

The Respondent wishes to show that the words *train, instruct* and *exercise*, as used in the constitution, do not authorize the ordering out of an escort, and are not of sufficient import to support the authority the general order claims. He says the *governor did not train the company* by which he was *escorted*, and was not present in a *military dress*; and, as the whole object of those words is theoretical and practical instruction, neither of these objects could be attained by this kind of exercise, wherefore, he infers the *use* to which the Cadets were applied on Election day was unauthorized. I differ from the Respondent in this respect toto cælo. There is as much instruction to be imparted to a company in its facings, wheelings, marchings, changes of position from column into line, and from line into column, and in the elegant duties of salute and the dress parade in the performance of escort duty, as in any other. Neither is it a valid objection to the propriety of the order that the *governor did not command the escort in person*, for the simple reason that the constitution does not require it. He may command the militia himself, or he may train, instruct and exercise them by any officer or officers under him or his subordinates. The Respondent seems to infer that because the governor was not in a military dress, the escort was not trained, exercised and instructed according to the provisions of the constitution. The Respondent does not surely mean to say, that, because the governor on Election day did not appear in a military costume, he had no right to give a military order. If that position is true, this court is not regularly convened, neither has the Respondent been arrested, for the governor had the same black coat on, when that order was issued, which he wore in the procession. By this mode of reasoning the Respondent would soon bring us to the conclusion, that the coat is of more consequence than the constitution; and when he does that, he will surely clear himself of the

charges, for the reason, that the governor had no right to institute them.

After thus attempting to show, that the words "train, instruct and exercise" are of no import to the case in controversy, the Respondent expresses his surprise that the Complainant should have rested his argument on the word *govern*, and considers that word as the least adapted, of all, to the support of his position. The Complainant cares not by which word the exercise of the governor's power is best warranted, nor whether it be under *one*, or *more*, or *all* the words which have been cited, or under the powers *incident* to the office of the commander in chief, so long as it be admitted that the power is conferred; but, after having favored him with an argument to show that the power to command an escort is not given by the words train, instruct and exercise, the Respondent cannot expect the Complainant's thanks for his attempt to prove that the word *govern* is of less importance than either, or all of the others. A reference to the Complainant's answer upon the powers of the constitution, will convince the Respondent that the Complainant's whole argument did not rest on the word *govern*. The authority derived to the governor was from the direct power the words train, instruct, exercise and govern conveyed, and the powers incident to them and his station as commander in chief; but of the four words cited, the Complainant said, the word govern was of the greatest import. This is not asserting that the other words were inoperative. Far from it; as, after the troops are brought into the field, they are peculiarly applicable to their use in that condition. But a higher importance was claimed to the word govern, on account of the peculiar adaptation of the term to the power which it is necessary the commander in chief should have over those of his fellow-citizens who are enrolled in the militia of changing their condition from a civil to a military purpose. It seems to be the most apt word that could be thought of to convey these peculiar powers. The Respondent himself admits that there is nothing more clearly expressed in the constitution or with less qualification, than the governor's authority to govern the militia; but he thinks that govern is more of a civil than a military word; that "as applied to armies, it does not mean the power of directing their military operations, but their police and discipline." It seems, then, that although the word is denied to be a *military word*, it has a *military meaning*; and that meaning, the Complainant contends, is not confined to the police and discipline of an army,

however important that may be to its existence and efficiency ; but comprehends the whole extent of a commander in chief's authority over its organization, its operations and its objects.

It is precisely in this sense, the word is used as applicable to the governor's authority over the *naval* forces of the state. "The governor shall be commander in chief of the military forces of the state by *sea* and *land* ; and shall have power to train, instruct, exercise and govern the militia and *navy*." What, let me inquire, is the meaning of the word govern, in this clause, as applied to the navy ? Is it not command ? Surely the words train, instruct and exercise, are not the terms by which the power to control and direct the designs and operations of the *fleet* is given. That is conferred by the word govern, which is there applied to the navy in a strictly military sense and no other.

The word is not only thus used as a military term in the state constitution, but it is the precise word which is used in the constitution of the United States in relation to the army and navy, where it gives Congress the power to make rules for their "government," and it is used in the same sense where it invests Congress with the authority to control the militia which shall be called into the service of the United States. The words are, "Congress shall have power to provide for organizing, arming and disciplining the militia, and for GOVERNING such part of them as shall be employed in the service of the United States." Here the word governing implies superiority, control, command. It is an operative word which cannot be dispensed with ; and the other powers would be useless without it. Now the Complainant contends, that just so much power as the word imparts to Congress, in the constitution of the United States, over the army and navy, and the militia which shall be called into the service of the United States, does the commander in chief of the state derive from its use in the state constitution.

It is, therefore, as well upon the construction of the constitution of the United States that the Complainant relies as an authority for the meaning of the word *govern* as a military term, as upon the pertinency of its use in the state constitution to the army and navy, where it becomes essentially necessary for the application to their proper objects of the subordinate powers of *training*, *instructing* and *exercising*, neither of which could be carried into effect in the militia or navy unless it were under a power to *govern*, which would, of necessity, be implied, were it not expressly conferred.

It appears to the Complainant that the argument in this case is in a nut shell, and the conclusion will result, from the manner in which the words in the constitution, "the powers with which the governor is intrusted and those incident to the offices of captain general and commander in chief and admiral shall be exercised agreeably to the rules and regulations of the constitution and laws of the land, *and not, otherwise,*" are interpreted.

The Respondent's argument supposes, that, under the prohibitory clause, all the powers of the governor are to be exercised according to the rules and regulations of the constitution and the *laws of the land*; and if there are no laws regulating their exercise, the power is worthless and cannot be exercised at all; — or, in other words, that although the constitution gave the power, it was the legislature alone which could bring it into action.

It appears to the Complainant, that, according to the acknowledged maxim, the constitution is the supreme law. By the *Bill of Rights* the first principles are laid down, and by the *frame of government* the different powers conferred, are distributed among those who shall occupy the different stations established by it. The moment, therefore, a governor was chosen and qualified under the constitution, that moment he was invested with all the powers which the constitution grants to whomsoever that office shall be bestowed upon, to the full extent of the grant, that is to say, unlimited; but not, as the Respondent supposes, illimitable; because the power to limit their exercise is not only expressly given in Chap. 1st, Sec. 1st, Art. 4th, which the Complainant cited, but because the very clause from which the Respondent draws his argument itself provides that all his powers shall be exercised agreeably to the rules and regulations of the constitution and the laws of the land, and not otherwise; — that is, not otherwise, where the law has regulated its exercise, but without any restraint until the legislature should limit or regulate it. How otherwise, I would ask, did the commander in chief govern the militia between the 25th of October, 1780, when the constitution went into operation, and the 3d of March, 1781, when the first militia law was passed, regulating the manner in which his power in that particular should be exercised. How otherwise could the governor have commanded the *fleet*, which the commonwealth then owned, as *admiral*; for if there was no law, (and there was none, known to the Complainant,) providing for the manner in which the admiral's power over the fleet should be exercised it would, of

course, follow, that the fleet, equipped and fitted out at a great expense, was powerless, and the whole militia of the state, which at that time, and a time of war too, constituted its chief defence, was without a commander because the legislature *had not regulated the exercise* of his powers.

The Respondent does not seem to be willing to give that force to the distinction between limiting the *power* to govern and limiting its *exercise* which the Complainant thinks necessary for a just determination of the point in question. The Complainant *no where* denies, that, so far as the legislature has *regulated the manner of the governor's exercise of his power of governing the militia*, he is not bound ; but only, that *so far* as the legislature has *not regulated its exercise*, the power is left as unrestrained, and as unlimited as the constitution gave it.

It is precisely so with the other powers named in the 7th article, upon which the Complainant had not time to remark the other day. The state constitution gives the power to the governor to *train, instruct and exercise* the militia, as well as to *govern* it. Now, in so far as the laws have said that his power, under these terms, shall not be *exercised* over them, but on *one training day* in a year, for the *particular purpose of company discipline*, and on one other day for *inspection and review*, and as one part are obliged to train, and the rest only to show their arms, is the *exercise* of the power limited. But I hold, for all useful purposes beyond these, such as instructing and exercising them in escort duty, exhibiting their military strength to the Indians, showing proper respect to the President of the United States, or the Nation's Guest, paying funeral honors to the illustrious dead, and other occasions, which, if it had not been impossible to specify, would probably have been enumerated, and its exercise on those occasions limited, as it is on others, there is now no limit, and the power is left unregulated, and is to be exercised upon his responsibility, until the legislature, by law, shall relieve him from it. The *manner* of the *exercise* of *these powers* is left precisely on the ground that the *power to govern is*. That is, where neither the constitution nor laws of the state have regulated their exercise, they are left unlimited, excepting so far as the constitution of the United States has done it ; and that it has done with regard to the three first, by prescribing the system of discipline by which the militia shall be trained and exercised, and to the last, by giving to the president the power to govern it in three specified emergencies. The Respondent, asserting " that if the power claimed exists,

it must be found among those conferred *directly* by the constitution on the *executive* or by some *necessary implication*, without which, the express power could not be exercised, or by *some law* which the legislature is authorized to make in clear and express terms," remarks, "that a resolve founded upon the supposition that the governor has that power, is neither proof that such is the true construction of the constitution, for the legislature are forbidden thus to exercise the judicial power of interpreting the constitution, nor sufficient to grant it, for such grant cannot be made by any but direct language, or by such implication as necessarily shows an intent in the legislature to confer a power not enjoyed before." The legislature, he says, may "pass a resolve under a mistake, or in ignorance of the meaning of the constitution, without violating any maxim of our government."

After admitting that the term *executive* was intended to be used by the Respondent in his argument in this and in one or two other instances as synonymous with *governor*, the Complainant will go further and admit, that a *single act* of the legislature or a *resolve appropriating money*, (which is in truth *an act* passing both branches of the legislature, and signed by the governor, and has all the force and effect of a law,) may be passed under a mistake or misapprehension of power. But this he will not admit without some good reason or cause is assigned for the supposition; nor ought it to be claimed, because such admission is necessary to the support of the Respondent's argument. Neither can the Complainant suppose the resolve of June 26th, 1811, which was signed by Joseph Story, as Speaker of the House, Samuel Dana, as President of the Senate, and Elbridge Gerry, as Governor, was passed under a *mistaken* construction of the constitution; the more especially when he finds its recognition of the governor's authority to order out an escort is in exact coincidence with a long series of legislative acts, with similar recognitions, ranging through the statute book for half a century.

Although the legislature is forbidden to exercise judicial authority, as the Respondent asserts, and although the judicial power is paramount to that of the legislature, when it oversteps the constitutional limits, it by no means follows that solemn legislative enactments made by those who are sworn to support that constitution, can be without influence even upon the decision of a tribunal of paramount authority which has a right to set them aside. Contemporaneous acts of the legislature, on the contrary, have always been considered as the strongest evidence

of the true intent and design of those who framed the fundamental compact ; and when contemporaneous acts are continually followed by others of like import by succeeding legislatures, and appropriations are annually made to carry them into effect, and all the powers these acts confer have been acquiesced in for half a century by the people and all the different branches of their government, it would follow almost as a necessary consequence, that if the terms of the original compact were even of doubtful construction, such acts would be considered, by the judiciary itself, as conclusive of their meaning and design. In illustration of this position, the questions and decisions upon them may be cited, whether Congress has the power to authorize the President of the United States to judge of the emergency in which the militia of a State shall be taken away from the command of the governor of a State, and placed under his own authority and control ; to pass a tariff for the protection of domestic industry ; to build a post road ; and to establish a national bank, and numerous others. But because the legislature are prohibited to exercise the judicial power, does it follow that it shall not interpret the constitution ? All acts of the legislature are interpretations of the constitution, and if these interpretations are to be considered as a forbidden exercise of judicial power, it is difficult to say how laws could be made, and almost equally as difficult to imagine how a case could arise for the judicial power to act upon.

The Complainant holds, therefore, that so much of his argument as rests upon the various acts of recognition by the legislature of the power contended for is pertinent, and entitled to the consideration of the court.

The Respondent contends that the clause conferring the power to govern the militia on the governor may be construed to mean, that this power is to be exercised by him "in any manner *not* repugnant to the laws and constitution ; or in such a manner as shall be prescribed by law, and not repugnant to the constitution." He adds, "that the latter is the true construction is most manifest, for it would be little less than absurd to confer powers by the constitution on one branch of the government, and empower another to abridge or take them away. Whereas it would be according to the whole analogy of the constitution to authorize the legislature to assign to the executive the particular *mode* in which its duties shall be performed, as is done in the case of the judiciary."

The difference between the judiciary and military powers

conferred by the constitution, the Complainant maintains, destroys the analogy contended for. The constitution provided that there should be an independent judiciary, and for a trial by jury, but it did not determine how many judges there should be, nor how far the jurisdiction of the court should extend, nor who the jury should be composed of, nor how they should be returned and empannelled. Having established the *principle* of an independent judiciary, and provided the manner in which the judges should be appointed, and by what tenure they should hold their offices, it left the particular organization of the judicial department to the legislature. But the militia was at that very time in existence as *an organized body*, and the then existing brigades, regiments and companies were adopted, in terms, in the constitution itself, as the proper sub-divisions of the militia until the same should be altered in pursuance of some future law. The terms train, instruct, exercise and govern, with which the governor was invested over the military power, had something immediately to act upon, and no proceeding of the legislature was necessary to bring the power into action. It was in a time of *war* when the constitution was adopted, and it would have been a very strange thing, for the convention then to have left a military interregnum. That it was not so intended, is not only to be deduced from the reasonableness of the supposition itself, but from the facts in the case, and the construction put upon the power at the time, all of which show that the constitution conferred the power on the governor directly, and did not leave it to be brought into action by the legislature.

Further, the same words are used as applicable to the *naval*, as well as the *military* power. If the governor could not exercise any authority over the one, he could not over the other, the clause being construed, as the Respondent contends, that is, that he could not act at all, otherwise than according to some legislative provision. There is no law in the statute book regulating the exercise of the governor's power over the fleet as admiral; but Governor Hancock nevertheless exercised power as such to the end of the war, and fitted out the ship *Tartar* and the lugger *Dreadnought*, and actually sent the sloop *Winthrop* to sea under the command of Capt. Little, in a very imprudent manner, as many members of the legislature supposed, who thought it impossible she should escape capture. If therefore the clause is of such doubtful import that it may be construed, either that the governor could not act under it, according to the Respondent's view, otherwise than according to law;

or, on the other hand, that it confers on him a direct authority to govern the existing institution in time of war, according to the powers vested in him until their exercise should be restrained or regulated by law, and then only according to the limits and restraints thus imposed, the contemporaneous construction by the action of the governor, at the time the legislature itself was in session, followed up, as it has been, by successive legislatures, from that time to this, must be decisive of its meaning.

At the time the constitution was adopted, the people were contesting the power of Great Britain for the establishment of their own freedom from the despotism of military rule; and while the very notion of military subordination required that any military institution should have but one head, its authorities were intrusted to the governor, with all the powers necessary to constitute it as such. Yet nothing was more natural than that the jealousy of concentrated power from which the people had suffered so much, should show itself in the provision which subjected the *exercise* of all the military powers of the governor over the army, the militia and the fleet to the limitation and regulation of the immediate representatives of the people, when and so far as they should see fit to assume it.

For these additional reasons the Complainant contends that the *power* to govern the militia, is granted by the *constitution*, and that its *exercise* only can be regulated by *law*.

Mr President—I proceed now to the *merits* of this investigation, and in doing so, it is proper I should state, that I appear before you in my public capacity of adjutant general of the commonwealth, as the official prosecutor of an officer high in rank, station and influence. He is charged with military offences, committed in the presence of the whole government of the commonwealth on a day of great public ceremony, the distinction of which much depends on the manner in which the military part of it shall be conducted. This is but the third time since the organization of the government, that the official organ of public authority has been ordered to appear as a public prosecutor; and the consideration that the proceedings in this case, will probably, hereafter, be recurred to, as a precedent; as well as that which arises from the relation in which the Complainant stands to the *government* as its functionary, and to the *Respondent*, as an *officer of like tenure of commission with himself*, has demanded of him particular care in conducting the prosecution. He has aimed always at the end which seemed to him to be the proper object of duty, that an *officer* in the

service of his country, and claiming, and being entitled to *its protection*, if *innocent*, should not be *convicted* through want of ingenuousness on the part of the Prosecutor, or by chicanery and artifice in conducting the prosecution ; nor, through want of certainty in the complaint, escape, if *guilty*, that condemnation, which the dignity of the *laws demand*, and the *offended honor* of his *commission* requires him to suffer.

In examining the charges and comparing them with the evidence, the court will observe, that care has been taken so to exhibit the specifications of the facts, with different degrees of aggravation, and under different heads of charges as to secure its finding where guilt exists, in spite of the metaphysical distinctions which those who are familiar with the proceedings of the civil courts are too apt to indulge in, but which the good common sense and practical knowledge of military men should ever prevent them from being entangled by. The court cannot find more than is charged ; but if the members should be of opinion, that any of the facts are set forth with a greater degree of aggravation than the evidence warrants, they will omit all or any part of such terms, and find the words of simple averment, which are proved ; but such words should not be omitted in the finding where the nature of the charge or specification proved, warrants their *implication*. So when the facts of the specification are fully proved, though there may be extenuating circumstances, the court may weigh them in their *sentence*, but not in their *finding*, as these must be left to the approving officer, who, upon his own comparison of them with the nature of the charge, and the recommendation of the court, when it shall be made, may dispense with the sentence and mitigate the punishment.

The Complainant must claim the indulgence of the court for a few remarks, made necessary by the imputations (he can most conscientiously say undeserved) which have been cast upon his motives and conduct, and which have just been communicated to the court in the Respondent's name.

As he before has said, this is not the first time the Complainant, from his station, has been ordered to become an *official public prosecutor* for a military offence ; but it is the first time, he speaks it more in sorrow than indignation, the disposition of a private complainant has been imputed to him.

He did not come here to avenge any supposed wrong or injury done to himself ; nor, by order of the commander in chief, in consequence of any act of the Respondent, which was, in the least degree, derogatory to his private character ; but *official-*

ly, in the name of the *commonwealth*, by order of its *chief functionary*, to prosecute an offender for a breach of its laws, and for disrespect to its civil authorities, in a manner and on an occasion which could not be overlooked without the just imputation of gross partiality and injustice.

The Complainant carefully avoided the introduction of any circumstance into the charges, which, with any propriety, could be said to be of a private character; preferring that the complaint should rest on the basis of those public considerations alone upon which it was predicated. Conscious of the purity of the motives which have influenced him, and of fairness in conducting the prosecution, the Complainant will think himself peculiarly unfortunate if he has produced in the mind of the court any such impression of unfriendly feelings as is imputed to him, when, not only no such feeling is harbored toward the Respondent, but, on the contrary, such were, and are his relations to him, as an officer of a corps, which almost entitles him to be considered as a part of the general staff, and such his private relations to him in society, and to his family connexions, on every side more than honored and respected as they all are, that the event which caused the arrest created in his mind great unhappiness, and made the preparation of the order of arrest itself an act of the most painful duty.

Neither is it proper in the situation in which the Complainant is now placed, of being obliged to disclaim any such unfriendly feelings for himself, that he should leave it open to the remark, that such must have been those of him by whose orders he acts. This whole community know, both from the public connexion of long private intercourse of the most friendly relation, which has existed between the venerable parent of the Respondent and the commander in chief, as well as from the recent opportunity which had been presented to him of becoming more intimately acquainted with the individual members of the corps the Respondent commanded, that nothing but a sense of the most imperious duty, arising from, I may almost say, a sorrowful conviction, that unless an opportunity was offered to the Respondent for his justification, *any future attempt to compel the execution of a military order in this commonwealth would be vain*, could have induced him to make this the subject of public inquiry. It is not for me to say what could, or would have been done if the Respondent's course had been different after the occurrence of the first event complained of; but it is proper to say, that his after conduct was such, as, in the governor's opinion, left him no alternative.

Protesting, therefore, for the commander in chief, and every member of his military family, that, so far as they have had any direct agency in the concern, or have been called on to express any opinion on the subject, none but feelings of the most heartfelt sorrow have influenced and directed them, I must now proceed to the other considerations which the case presents.

In the remarks, which I feel it my duty to make upon the nature of the charges, and the evidence by which they have been supported, I must necessarily be more general, than so great a volume of crowded testimony would seem to require. The consideration is, however, no small relief to me, that against public injury from this circumstance, the government have a sure guaranty, in the attention and diligence of the court, to the examination of the testimony. The particularity of their minutes of the evidence, being written at great length, must have impressed forcibly on their memory the facts in the case; and if anything shall have been overlooked, the fidelity and accuracy of the judge advocate will expose it, as, doubtless, he will discover in summing up the evidence the same intelligence and ability which every page of the record exhibits.

Courts martial are common-sense courts, and the members of them are supposed from their own experience to be acquainted with military practices and usages, and are to be governed by them, in their decisions. Not the practices of the militia of other states, but of this; not the habits, usages, and public ceremonies of other parts of the country, but our own. These courts are constituted so as to be governed by military usage, rather than by legal technicalities; for if it were not their duty to reject, rather than to be guided by these, there would be great danger of such courts being perverted to purposes of chicanery and oppression.

The attention of this court is now called to investigate some of the circumstances of the organization of the civil government of their own state, which but comparatively a few of the people have however witnessed. But those who have attended it, have discovered something more dignified and imposing in the ceremonies of a Massachusetts election; something that impresses the mind with more respect for the character of those who established them, and with more veneration for the principles which they serve to perpetuate, than the *forms* of any other state on a like occasion, or even of the United States at the inauguration of the president. But the disposition for innovation, ever

captivating, is so great among us, that the most venerable institutions, such as in other countries, and under different forms of government, are supported from mere habit, are here every day assailed, the principles on which they are founded disputed, and the customs of our ancestors, the land marks of primeval purity, are, one after another, torn up and destroyed. . The change of the season of the year in which the government shall be organized, united with the very circumstances of this election, and the disavowal of public authority, by those who have on this occasion, as heretofore, most anxiously sought its exercise, *as a favor and an honor*, it is not at all unlikely will be the ground work of an effort to destroy the custom, (one of the venerable and respected relics of our puritan ancestors,) of the civil rulers of the commonwealth, after the annual organization of the government, proceeding through the public streets in a body, under a military escort to the church, there, in the public presence to invoke the blessing of the Almighty Ruler of the Universe, upon the feeble endeavors of those, who, without his aid, would be incapable of wisely conducting the affairs of the small community, over which they are placed in authority. Had this been the first time, since the adoption of the constitution, of the governor's exercise of the power his order assumed, it would seem to have given just cause for that strict examination into the principles of it, which it has undergone. But now, to dispute its authority, after the unintermitted practice of the government from the very year of its organization, seems much like doubting, whether the venerable oak of antiquity stands in the soil in which it was planted.

The tedious inquiry into the most minute circumstances of the transactions which are the subject of charge, has produced a mass of evidence relating to a few occurrences, which rather tend to confuse than to develop their true character.

The case is one of such simplicity, all the circumstances of which occurred in a single hour, that this court, with the assistance of the judge advocate alone, would have tried it in three days. But when the facts themselves furnished no defence, other colorable circumstances were to be elicited, upon which to ground it. And it is to this cause, more than any other, that this court has had so tedious a session. The Respondent's illustration of defence, is drawn from the *circumstances* which the evidence developes; and by it those which are merely exculpatory, are made justificatory. It is for the court to detect the fallacy of the views of the transaction which the Respond-

ent's defence exhibits. In aid of their desire to find the truth, I shall endeavor to remove the vast body of immaterial matter which envelopes it; and, considering the evidence only, as it relates to the *few facts* upon which the complaint was predicated, endeavor to clear it of the doubts which the ingenuity of the Respondent's advisers, by magnifying immaterial circumstances into the main object of the charges, have thrown upon it.

Before proceeding to the investigation of the evidence, the court will indulge me in some few general observations which apply to different parts of the case, and which are made necessary by the many legal distinctions which appear in various parts of the Respondent's defence, some of which are more correct in principle, than they are in their application; and others of which are totally untenable, either by law, or the practice and usage of military courts. Although the Complainant acknowledges his want of familiarity with the rules of evidence, it will be long, he hopes, before the first principles of the law will be forgotten by him. He thence infers that some rules are contended for, on the part of the Respondent, in respect to the form of the charges and specifications and the application of the evidence, which are not warranted by any authority.

A *specification* is nothing more nor less, than a statement of certain material facts, which are supposed to establish the crime or offence charged. It should be definite as to time, place, and person. Absolute precision is not required; but a convenient degree of certainty shall be alleged, in order that the party accused may know the nature of the offence, and the general facts which constitute it.

Abstract and sophisticated distinctions are not countenanced before military tribunals; nor, are the rules and axioms of civil courts to be their *sole* guides. Substantial justice being the object sought for, the practical men invested with its administration are no where required to be tied down by the strict rules of pleading or technical forms. The great purposes of justice are not, and cannot be trammelled before courts martial, in this manner. Such courts must necessarily act on the foundations of human belief, as they are applied to other occurrences, except that the facts are required to be accompanied by the sanction of an oath. Light may be gained by examining the rules of evidence established by civil courts, and as a general directory, these rules should be followed in forming a decision upon a doubtful question; but beyond this, it is not necessary they should be adopted. With these remarks, let some of the grounds contended for be scrutinized.

It may be true that one *charge* lends no support to another, and that each should be considered distinctly by itself; yet, as it regards the *specifications*, this may or may not be true. It will depend, and unavoidably so, on the facts set forth in the specifications themselves, whether they do or do not maintain each other. If the object of the specifications be to define the *quality* of the act done, and the facts are re-stated more than once for this purpose, with distinctive marks, although the various qualifications may not be established by proof, still the facts stated in one specification, are not consequently at variance with those in another, nor, are they to be rejected, in determining whether the accused is guilty of the *charge* under which they are placed.

Nor is it true, that the same evidence which proves *disobedience of orders*, may not also prove *neglect of duty or unmilitary conduct*. Every act of disobedience of an order involves both neglect of duty and unmilitary conduct; although the converse of that proposition is not true. The evidence adduced to support the first charge, may maintain the others. In some military codes, the punishment would be different in the one case from the other; and where this difference exists, it becomes material to divide the charges, although it is not necessary to do so where the punishment is the same under all. The testimony received, cannot, however, be limited. If it be applicable to the *support of any fact in question*, it is to be *admitted and weighed as a fact in the case generally*.

Another distinction taken in relation to the burthen of proof, is not considered on the part of the prosecution to be well founded in reason or law, in the manner it is stated in the defence. The Prosecutor must establish the material facts charged. On him rests this burthen; but because the accused leaves in doubt his innocence, it by no means follows, that the original burthen of proof, is shifted and left on the Complainant, *merely because a doubt is raised*. To illustrate this, take the first charge of disobedience of orders. All that is incumbent on the government, is to prove the issuing and due transmission, and non-performance of a legal order; the burthen then shifts, and he who would excuse his omission to obey, must establish a valid cause for non-obedience, beyond all reasonable doubt. If he leaves his justification in a questionable shape; or, if the circumstances in palliation were within his own control, he must be convicted. Thus, if an officer receives an order for the performance of a particular duty, and

on the way to its performance he is met by another officer ranking him who gave the first order, and he countermands the first order, the latter must be obeyed. But if arraigned for the disobedience of the first order, he must clearly and unquestionably prove that the second order was a direct and positive countermand of the first which he was bound to obey. Still no *voluntary act* in the exercise of the soundest discretion, even to carry into effect an order in a different though supposed better manner than the order itself directed, can be any excuse for the disobedience.

It is not to be questioned that every offence in proceedings at law should be *formally* and *substantially* described. This rule, drawn from our constitution, is often applied to proceedings of a different kind; and, it may be conceded, that it is generally a proper guide in designating any infraction of public duty. That this is under *all* circumstances, and upon *every* occasion to be the *sole* method of setting out an offence is not even true at law. Much less so before tribunals not governed by the same artificial system of practice. Whenever it is necessary to determine the character of an act by any adjuncts, the rule may be usefully resorted to. Still the governing principle is merely that such a description of the conduct complained of be given, that the accused may plainly discern "the extent and front of his offending" in order to prepare for his defence. Such modes of describing military crimes as have been usually approved of in this commonwealth, have been resorted to on the present occasion, and none other. And whatever complexion may be given by ingenuity and sophistry to the terms employed in the specifications, it cannot be kept out of sight or forgotten by this tribunal, that they are solely intended to *characterize the offence*, and to make known the intendment which military law affixes to the fact or deed complained of.

Where an officer has a duty assigned to him, his *mind* may be said to be free to perform or omit it. If he omits, the will being free to determine the course to be pursued, it is a *wilful* omission, and it may well be alleged to have been *wilfully* omitted. Nevertheless, the offence, the military crime, is, substantially the *omission*.

If the Respondent, whatever may have been the motive in his own breast, being directed to report himself at the church at the expiration of half an hour, chose to remain elsewhere with those under his command, whatever may have been his design, he is answerable; and his offence, in a military point of

view, is not, in the slightest degree, diminished by the circumstances which induced it. There was an exercise of his *will*, and it is because he did exercise his *will*, and not obey that of his superiors, that he is now held to answer. The proposition is advanced by the Respondent, that the *act* done by an officer, or the omission to perform the duty enjoined by his orders, does not of itself furnish evidence of the motive which influenced him. In most cases, the intention can alone be discovered by the act. If with deliberation an act is performed, the law will presume that the consequences naturally flowing from the deed, *were intended*. Thus, if an individual throws a brick from the house top in a populous city into the street, or projects any other article, which, if it strikes a passer by, produces death, our criminal code does not require that the *intention, independent of the act*, should be *proved* to establish the crime of murder. It declares that it was done with malice aforethought, although there might be no *preconceived intent*. The act being proved, it is for the party committing it to show that it was by inevitable accident. It is needless to pursue this common law illustration. Every officer who accepts a commission, impliedly, but necessarily, pledges himself to the government, that he possesses an adequate knowledge of his duty; therefore his acts and omissions are always to be weighed and scanned upon the assumption that he has every requisite for the proper discharge of his trust. If he be arraigned for unmilitary conduct in the execution of his duty, would the excuse be tolerated for a moment, that he supposed he possessed the requisite knowledge, but was mistaken? That he ought not to be convicted of his offence, because his intention was honest and pure; but misapprehended the extent of his own capacity? Such an excuse can have no foundation on which to rest before a military tribunal, any more than the careless or wanton use of a deadly weapon which deprives an individual of his life, can be deemed innocent in a court of law.

Obedience is the life-spring of military conduct, whether it be on parade, or on the forlorn hope; *implicit, unreserved* and *prompt obedience* is the *unqualified duty* of both *officer* and *soldier*. If he neglects or omits to yield this obedience, unless from physical force which he cannot resist, it is an *intentional* and *wilful disobedience*. If he does not manifest his will by performance, it is a *designed* resistance of the authority by which he is governed. If it were otherwise, no individual who omitted his duty could ever be convicted, unless he coupled with his

omission the folly of declaring his *intention* to be guilty of the breach of the duty which he was enjoined to perform. The allegation in the specifications of the different charges therefore that the act was *wilfully* and *intentionally* done or omitted, amounts to nothing more than giving a descriptive character of the offence. These expletives might indeed have been omitted, without varying the nature of the charge or the character of the proof requisite to support it; but their addition does not alter the circumstances or bind the prosecutor to furnish other evidence than what arises from the substantive fact of the crime or offence alleged. The motive necessary to produce the act is to be presumed to have had its influence, whether the individual is tried by the military or criminal code established for his government. The bosom of the offender cannot be unlocked and his motives there sought out; his acts unavoidably must be his interpreters.

The charges and specifications are founded upon facts and customs which are of public notoriety and which the evidence in the case has developed.

These shortly are, that, it has been customary, from the adoption of the constitution, that a procession consisting of the governor and council and the heads of the different departments of the government, the president and members of the Senate and the speaker and members of the House of Representatives with their respective clerks, should be formed at the State House, and proceed thence under a military escort to church for the purpose of hearing a sermon from a clergyman annually chosen by the legislature for that purpose, and attending to other religious exercises suited to the occasion, on the day of General Election. That the Independent Company of Cadets, which is not attached to any regiment or brigade, and the number and rank of whose officers honorably distinguish it from all other companies in the commonwealth and peculiarly fit it for this particular service while they exclude it from duty in the line, has been almost invariably ordered to perform the escort duty of the civil government on the anniversary of the Declaration of Independence and on days of General Election from the time of the renewal of its charter by Governor Bowdoin in 1787, to the present time. That this is a duty, which from long established usage, that company has considered it a peculiar privilege to have the honor of performing. That this company, being under the command of the Respondent, was ordered by a General Order, dated the 24th of December last, and by a

Division Order founded thereon, dated the 30th of the same month, to perform that duty on the last Election day, which took place on the 4th day of January last. That, in obedience to said order, at the time and place therein mentioned, the Respondent reported for duty, and afterwards took up the escort, and conducted and delivered the same, at the Old South church with the customary salutes and honors. That seats were provided and reserved for the escort, as has usually been practised on all public occasions, which were not occupied by them on this, but, that the company, without orders, marched away from the church, and were proceeding on their way to partake of a collation at the Exchange Coffee House which was there provided by their officers for them, when an order was delivered from the governor to the adjutant of the company, and by him communicated to the lieutenant colonel, to report for escort duty in half an hour. That the company neither reported as ordered, nor was it present to take up the escort when the services were over, and although proclamation was made by the sheriff, after the services of the church were closed that the procession would return in the order in which it came, as there was no escort present to conduct the same in that order, the customary ceremonies of the occasion were necessarily omitted, and the governor and several other members of the government left the church and proceeded in the usual course, through Washington, Winter, Tremont and Park Streets, towards the State House. That when they had arrived in Tremont Street at the head of Winter Street, the company, which had run through the streets to intercept the procession, met the governor and other gentlemen who composed it, and attempted to form in the path before them and take up the escort without leave or command, and obliged the procession of the government to turn out of the usual path, and broke up its order. That his excellency then sent a message to the Respondent, informing him, that he had no further orders for him that day, and proceeded to the State House. But, notwithstanding he was thus dismissed, the Respondent, instead of retiring with his company, as he was ordered, soon afterwards appeared with it in front of the State House, and sent up his adjutant to the governor in the council chamber for further orders.

This is the substantial history of the proceedings of the day, (some of the circumstances of which may be varied by the weight which shall be given to contradictory testimony,)

upon which the charges and specifications of charges in the complaint are founded.

It now becomes the duty of the Complainant to proceed to the examination of the evidence in support of the charges which arise out of these proceedings.

The *first charge* is for *disobedience of orders*. — The first specification of this charge states, that the Respondent, as Captain of the divisionary corps called the Independent Company of Cadets, with the rank of Lieutenant Colonel, by the General Order of the 24th Dec. last, was under orders to perform escort duties to the government on the last General Election, on the 4th day of January last, to attend public worship at the Old South church, the customary place therefor, and return thereafter to the State House, as is usual and customary; that the Respondent, having reported for duty at the time and place mentioned in said orders and taken up the escort, conducted the procession, consisting of the executive and legislative branches of the government and their officers to the meeting-house, and while the government aforesaid was in the same, departed therefrom, and did not return and escort the procession back to the State House after the services were over in the usual and customary manner, and so, in disrespect to the said government, disobeyed said orders.

The Respondent having pleaded to the charges, it is not necessary for the Complainant to go farther back in the proceedings than to show what the evidence clearly supports, that the General Order of the 24th of Dec. last, was issued on that day, and mailed for Major General Capen, Dorchester, to whom the same was directed, and under whose immediate orders the company is; that on Wednesday, the 28th of Dec. the day after the Respondent was commissioned as commanding officer of the company, he addressed a letter to the Adjutant General as follows:

“DEAR SIR, — Will you have the kindness to send me by the bearer, the order for the Cadets to parade on Election day, I will send it to the Major General so that it may come regularly down. I make this request, that the longer notice the company can have, the greater probability of bringing out a goodly number. If the order be sent to Dorchester by post, a delay in transmitting it must necessarily occur. If you prefer it, the order may be sent to Major Capen, aid-de-camp to the Major General, at the Old Bowdoin House, in Beacon Street, who will see that it is sent regularly down, &c.” (See letter annexed marked 9):

That the above letter was left at the Complainant's house on Wednesday evening, and that on the following morning, a duplicate original of the general order requested was made out and directed to the Respondent, and left for the messenger to deliver : That that duplicate original was delivered by the Respondent himself to Mr Thompson, clerk of the company of Cadets, who boarded at the Old Bowdoin House in Beacon Street : That Major Capen, the aid-de-camp of the Major General, referred to in the Respondent's letter, also lodged at the same house : That the duplicate order was received by Thompson on Friday, with directions to deliver it to Major Capen as soon as he saw him, and which he did deliver to him that day : That Major Capen wrote thereon the division order of the 30th of Dec. which was approved by the Major General, and ordered to be issued on Saturday, the 31st, (he having before that time received the original order which was sent to him by mail :) That, according to a request Major Capen had previously received from the Respondent, he, on the Monday following delivered the order to Mr Thompson, who sent the same to the Respondent ; and that the members of the company were notified, for escort duty, by the colonel's command, on Election day, according to a blank form of notification annexed to these proceedings, on Saturday, the 31st of Dec. four days before the day of parade.

However difficult it was to obtain the facts from witnesses who evinced a lively-feeling in the Respondent's favor, but who, the government was *obliged* to make its own, and notwithstanding some of the facts did not come out, but on a close cross-examination on the fourth day of the proceedings of the court, and the *second* or *third* time the witnesses were called to the stand ; yet the facts now clearly appear on the record, as above stated, and cannot be disputed. I will not therefore take up any more of the time of the court upon that part of the evidence, than is necessary for the remark, that, by the proof thus exhibited of the actual receipt of the duplicate original of the general order of the 24th of Dec. by the Respondent, the actual delivery of which Mr Kuhn the messenger could not remember, was the government relieved from that responsibility, which the Respondent by his letter had assumed, and which would otherwise have fallen upon some of its officers for not seasonably transmitting the orders thus received, and whose avowal of that omission on the records of a public tribunal is but an aggravation of their misconduct.

The order which is thus seasonably traced into the Respon-

dent's hands, requires the Independent Company of Cadets to perform escort duty for the government on the day of General Election, on the 4th of January then next, and directed the company to report to his excellency for further orders. It is proper here to remark, that the order is drawn in the usual form, and was directed to a company which has performed similar escort duties to those required on this occasion *ninety-eight times* since the year 1796, and almost every year before that, from the time of the celebration of the adoption of the federal constitution in 1788. The character of the duties they were called on to perform were well known to them, and all the customs and ceremonies attending the same. The objection that the evidence does not support the specification seems therefore to have been founded on a state of things that did not exist. It supposes that the company did not know what escort duties were, nor how to perform them, without special directions, such as were not given, and which, if given, would have conveyed an imputation upon its officers, that would not have been received as a very flattering compliment to their understandings.

Orders are express or implied, and are to be understood with relation to the nature of the duties to be performed. When the general object is understood, a wave of the hand is an order. If an officer was ordered to a distant position with a view to turn the enemy's flank at a time when any particular operation should be attempted elsewhere, a wave of the hand from the officer in command would be an *order to advance*. So if two officers were commanded to manœuvre their respective commands alternately in a field not large enough for both, and a specified time was allowed to each, during which the other should keep out of his way, and after one had manœuvred some time, the commanding officer should say to the other, *the field is yours, sir*, this would be an order for him to commence his operations. So when a salute of a march is paid by the band, if the officer who receives it puts on his hat before the march is played through, it is an acknowledgment of the salute, and an order for the band to cease playing.

The general order which shows the object for which the company was called out, was, for the company to perform escort duty to the government on the day of General Election, and to repair to the State House at the time and place assigned, and report for further orders. The defence alleges that no further orders were given, and, of course, that the specification is not supported. Let us see whether this is not merely a captious objection. In

the general order of the 24th of December, which the Respondent acted under, he had notice that the requisite provision for the day would be made by the quarter master general. The customary collation, by previous concert with the commander of the corps, was arranged for this occasion, in a less formal manner, than heretofore. This was done in order to save the company the necessity of exposure to the weather, in coming up to the State House at the usual time, and waiting there an hour more, than, by the arrangement made, it would be necessary. Col. Quincy, aid-de-camp to his excellency, and acting in the council chamber where his excellency was, *requested* the Respondent after he had reported to *invite his company to partake of a collation* in the ante-chamber. This was in order that the collation was ready which he had been notified would be prepared for him. Col. Quincy then informed the Respondent, "that the two houses were organized, and would, probably, be ready to proceed as soon as he was ready to receive them," and testifies that "the corps was, immediately afterwards, formed in front of the State House." This was an order to prepare to take up the escort, and shows that it was received and obeyed as such. "I went down," the witness says, "and communicated with Captain Sargent, (the adjutant) who informed me that the company were in readiness to take up the escort, and I informed the governor, who immediately presented himself before the corps and received the usual salutes." The witness does not say in terms, in his testimony, that every time he communicated an order, he formerly repeated his authority from the commander in chief to give the orders he did, by saying, "I am commanded by his excellency to inform you that if your company is prepared to take up the escort, he is ready to proceed," &c ; but the court will not doubt that his excellency's orders were communicated in the usual and proper language and manner, and were well understood by the Respondent who received them. These orders all related to the performance of the general duty which it was the object of the general orders to have performed ; and under and according to them the service the Respondent was called upon to render, was undertaken by him to be performed, as was well understood, in the usual and customary manner.

Of the same character is the exception, that there is no order in terms, expressly given, for the Respondent to go to the Old South church and deliver the procession, and after the services are over, take up the escort and come back with it to the State House.

All this, and a thousand other incidental circumstances, such as the streets the procession should pass through ; the door by which it would enter the church ; who the procession was composed of, and who the company would permit to pass its front into the church ; these are all implied and understood, and if they had not been, would have been made known to the officer whose duty it was to make the inquiry, if everything was not explicitly understood that the occasion required. But as the Respondent did not at this time " report for *further* orders," it is presumed he well understood the object of the orders and communications made to him, and having taken no exception to their informality at the time, if any there was, (which is the last thing to be imagined on a day of public ceremony,) it is too late for him now to say, that " neither of these communications are stated to have been by his excellency's directions." His duty was suggested to him in the general order, he reported according to it, and undertook the service, and its accomplishment rested on his own responsibility. So far then, there is no dispute about the facts.

The breach alleged, is, that the Respondent with his company marched away from the meeting-house, and did not return and escort the procession back to the State House in the usual and customary manner. The evidence in support of it, rests upon the fact, that the Respondent delivered the escort at the church, countermarched his company, and afterwards was in the act of marching off in column, when Col. Quincy delivered the order to Capt. Sargent, for the Respondent to report as thereby directed, and that Capt. Sargent commenced repeating this order to the Respondent, while the company were on the march. Whether the Respondent had actually marched his company away from the meeting-house to the Exchange Coffee House, or was on the march with a design to go there, or anywhere else, is immaterial. He ought not to have marched away at all. He was on duty, under orders to attend the procession as its escort. Pews were reserved for his company in the church, where they would have been as comfortably situated as the rest of the procession. Their occupation would have been not only comfortable to themselves, but would have been an act of becoming propriety. And, whatever may have been the practice of the company on previous Election days in May, in the inclement month of January, the taking of the seats would have seemed to have been the course which a discreet commander would have adopted *for the protection of his men,*

if for no other reason. Their appearance in church on the 4th of July has been customary, and no good reason has been given for not occupying the seats which were reserved on this, other than that a collation had been ordered at the Exchange, which it might naturally have been supposed would have been more gratefully received by the members after the services of the day were over, instead of their being called to it within an hour from the time they had taken refreshment at the State House. But the Respondent had made different arrangements, and he chose to march off to accomplish them, and he did march off, without orders, contrary to the rules of military propriety and the practice of the company on like occasions. This is proved by Colonel Baker's testimony, who has been a member of the corps for thirteen years, and in answer to the *Respondent's question* too, who probably expected to prove a contrary custom by putting it. *Question.* "What orders have been usual after delivering the procession at the meeting-house, as to the time of returning?" *Answer.* "The company were always relieved for a limited time, differing at different times, sometimes for an hour, and sometimes during the services," so that the *military rule* of waiting for orders, is according to the *former practice* of the company. Of them both, however, the Respondent was regardless; and without waiting a moment for the *order of relief* from duty, which was, in fact, sent to him as soon as the governor got into the church, he voluntarily moved off, and his company was overtaken by the governor's aid, who was charged with the delivery of the order. Can any one doubt, from all the evidence adduced, that the Respondent's intent on moving off, was to accomplish the design he had expressed to one of the witnesses, to repair to the Exchange Coffee House for refreshment during the services? He was not only marching off, but he was marching in that direction, and after receiving the order of relief from duty for half an hour, he resumed his march, and actually went there. There was as much a breach of the specification, in the act of marching away from the church as there would have been if the order had not been sent out quite so promptly as it was, and the company had been out of sight when the officer who carried it, arrived at the door.

There has been a weak attempt to show that this movement of the Respondent was only to go down a few paces, to a wider part of the street, where the snow had been shovelled off, and there to have waited the expected order. A question was seriously put to Colonel Quincy in his first cross-examination tend-

ing to make an impression that proof of such a design was to be the point of defence. This is the question put to Col. Quincy: "Was there or not a deep snow on the ground, at that time, and especially, in the front of the church?" This, being answered affirmatively, was followed by another; "Does not the side-walk widen below the Old South church, *and was there a space from which the snow was cleared off?*" To this the witness answered, "he did not know." Now though the *Complainant's* witness could not, in all probability, have been made acquainted with the Respondent's arrangements; yet, if such an arrangement had in fact been made, some of the *Respondent's* witnesses could have proved it. I expected it from Braman, who was always in the *right spot* at the *right time*, but he having load enough to carry was not questioned to the fact, and the only evidence of it is what Captain Sargent dropped in answer to some inquiries at the close of the investigation. These were put to him by the Respondent as it is presumed to take off the force of his previous answer, which stated "that he approached Colonel Winthrop to deliver him that order, *before* he halted his company." The question put to Captain Sargent, to take off the attention from the important fact thus disclosed, was, "For what purpose did the company first move from the meeting-house door in Milk Street after delivering the escort?" The answer is, "I believe on account of the snow, which was very deep and very inconvenient. There was more snow in front of the meeting-house, the *street below* was much *broad*er and *clear*er." Now here is the simple fact stated, that the street was *clearer* and *wider below*, but not a word is said about *the snow being cleared off from the side-walk*. Perhaps the next question, however, will fix it; but, no: the point is avoided by the question itself. *Question*. "Did Colonel Winthrop tell you that he moved the company on account of the snow, or is it your own supposition?" *Answer*. "He did not tell me personally; I heard the company complain of the snow, and Col. Winthrop say, I will get you out of it, or something of that sort." This is all the evidence to that point; and what does it prove, but a design of Col. Winthrop to *get them out of the snow*? It may as well be inferred that this was to be accomplished by marching them to the Exchange Coffee House as to the spot a little lower down, which the Respondent's witnesses were not called on to prove was cleared of the snow, and which the question to Col. Quincy led to the supposition would have been proved, if the fact was so. That he intended

to march to the Exchange is better warranted, for if this was not the Respondent's design he would naturally have said to the complaints of his men, "we must wait for orders before we go, and as I have had a place cleared of the snow on the side-walk, a little below, I will march you there, where you can stand comfortably until we get them." So important a fact as this, had it existed, *would have been proved*, and the additional circumstances also that when Captain Sargent delivered his message, the company came to a halt in the middle of the street; and that neither at that time, nor afterwards, when some of the company complained of suffering in their feet from standing in the snow after their return from the Exchange Coffee House, were they marched to the cleared place on the side-walk, as it is probable they would have been, if there had been any such place prepared. This whole affair bears the appearance of an afterthought, made up to exculpate the Respondent from the 1st specification, but was found to be more difficult of proof, than so simple a matter would have seemed to require. I therefore leave this specification to stand on the incontestable ground on which it is placed, with the single remark, of no small bearing however, that in the Respondent's general observations on the evidence on this head, the testimony of Captain Sargent is directly reversed, he being quoted by Respondent as saying that "he communicated no order to the Respondent *before* the halt," when the opposite fact, that "he approached Colonel Winthrop and spoke to him of that order *before he did halt his company*," is expressly asserted by him.

2d specification, 1st charge. This is like the first, with this addition, that after delivering the procession at the meeting-house the Respondent was ordered "*to report with his company for escort duty after half an hour.*" Yet he did not so report "at the expiration of said half hour, nor was he there with his company at that time, nor at any time thereafter, ready and prepared to take up the escort of the government, until the members thereof had left the meeting-house and did not escort them back to the State House as is usual and customary, and so in disrespect and contempt of the authority of the government knowingly and intentionally disobeyed said order."

3d specification, 1st charge differs only in the words of the order of reporting, it being stated in this specification that the Respondent was ordered "*to report in half an hour.*"

These two specifications being so nearly alike may be treated of together, it seeming now to be admitted, that, if the order

was as Col. Quincy stated it, "to report with your company, for escort duty after half an hour;" or, as Captain Sargent stated it "in more than half an hour," or in "half an hour or more," the order was understood by the Respondent to mean "*in half an hour.*" The difference in the terms of the two specifications being now of no more importance than to show, that the breach was well alleged in the first; inasmuch as, to report *after* half an hour, meant that he should report immediately after the half hour had expired, or, at its expiration. The difference is so minute, between the 2d and 3d specification, as to be worth no further consideration, since the understanding the Respondent himself had of the tenor of the order, by whatever language it might have been conveyed to him, is now upon the record. Although at the time the specifications were framed, it was the uncertainty of the terms in which a verbal order might have been transmitted, that rendered it advisable to have two specifications.

The above remark is equally applicable to the 2d and 3d specifications in that particular, and will not be repeated, when we come to their consideration.

It ought, also, to be added, that the observations which have before been made, in considering the 1st specification, relating to the duty which devolved upon the Respondent to perform the escort duties for the government *both to and from* the church, in the usual and customary manner, by the general order of the 24th of December, apply equally well to these, and all the other charges and specifications of charges in this complaint, and need not therefore be repeated.

The fact being also admitted by the Respondent's letter of 4th January, that such an order was received by him; and it being established that he did not actually report in half an hour as ordered, and that he was not at the meeting-house when the services were over, and did not escort the procession back to the State House, would seem to render any further remarks in support of these specifications unnecessary, were it not for the discrepancy between Col. Quincy's and Capt. Sargent's testimony, relating to a *conversation between them* at the time the order to report was given at the church, and which, it is thought, relieves the Respondent from the responsibility of reporting as he was ordered. This makes it necessary to examine into the facts in the case with a view to ascertain not only what the order and instructions given by the commander in chief actually were, but also whether they were given to a proper officer, and how the Respondent understood them.

Upon the first point it is not now disputed that the commander in chief's orders to Col. Quincy were, that the Respondent should "report with his company, for escort duty, after half an hour," and nothing more. Col. Quincy says he delivered that order to Capt. Sargent, in the terms in which he received it. What the understanding was of those through whom that order passed, or to whom it was delivered, and however differently it may have been interpreted by them, was never made known to the commander in chief, who acted therefore through the day on the supposition, which it is presumed will be found to be correct, that the order was delivered, received and understood according to its terms. By it he bound himself, and, if it was duly transmitted, the Respondent, to its observance. The meaning of the order itself was clear, and could not be interpreted to mean anything else than this, that for the absence of the company for half an hour the governor would be answerable, but for a longer absence than that, he would not, at the time he gave it, undertake to be. He recollected that an hour's absence was too long, three years since, and the mortification of the government, and the unpleasant situation in which the officers of the company themselves were placed, in consequence of their not returning in time to resume the escort at the conclusion of the services. He was, therefore, particularly cautious not to give too long an absence at the time, and equally so, by the express order for the commander of the escort to *report* at the time fixed, to have it in his power *then* to extend the time, or otherwise to act, as circumstances should then render proper. It was not a mere leave of absence for an hour, or during the services, as Col. Baker testifies had been usual, but it was an order to *report*, and *with his company*, and for *escort duty after half an hour*. The order was thus precise, that it might not be misunderstood, *in any of its particulars*. It was a command for the Respondent to *report, who, with, what for, and when*. By this order, therefore, the commander in chief took the responsibility of the Respondent's absence for half an hour, which, afterwards, by not complying with the injunction to report, the Respondent took upon himself. The word report is a *technical, definite*, military word, not capable of misinterpretation. The *substantive purpose* of thus reporting was, also, expressed in the order, and if that had been accomplished, the omission of making a technical report would not have been noticed. But when the substantive purpose of the order fails, then comes the question, *whose fault is it?* And it is here freely admitted that

however correctly the commander in chief may have acted according to his understanding of the matter, unless this is fixed upon the Respondent, he cannot be convicted of this specification. This requires a minute examination of facts and circumstances, arising from the contradictory testimony of two witnesses, to neither of whom intentional error can be imputed, without great injustice to gentlemen of unsullied integrity and honor. Whatever misapprehension there was, must, therefore, be traced to the circumstances and condition of the witnesses at the time, their respective situations and familiarity with their duties, the accuracy of their recollection of other events which transpired at the time, and of the understanding of the Respondent, to whom only one of the witnesses communicated, and from whom only his impressions were derived.

First. The order to report was given by Col. Quincy to Capt. Sargent, the adjutant of the corps which the Respondent commanded, and was, by him, communicated to his superior. According to strict military principles that order should have been given to that superior himself. The general rule is, that orders from a superior shall be delivered to the inferior in command in person; but circumstances vary cases. On the field of battle, for instance, where the staff are not numerous and immediate action is required, orders are delivered from one staff officer to another for communication to their respective principals. So, in manœuvring, where the officer in command is not at hand, an order delivered to his orderly staff officer, will often be as effectual, and more so, than if it were delivered to the commander in person, at a distance from the immediate scene of operations, and, in such a case, should not be withheld from him. This was the situation which Capt. Sargent relatively held to the Respondent. He was his orderly officer; by him, and through him, had several communications been made and received through the day. On this particular occasion, though Col. Quincy sought the commander himself, yet, as he was at the head of his company, marching rapidly off, and could not easily be overtaken, and Capt. Sargent was nearer at hand, it was proper to deliver it to him, and he had as much right to receive this order for his colonel, as he had, in the forenoon, to say for him that his commander was ready to receive the procession, without communicating to him, at all, after the inquiry was made, whether the escort was ready.

Second. What was the order? There is no need of repeating Col. Quincy's testimony. It is *plain, simple, direct* and *posi-*

tive ; the *precise words* are *given*, and a memorandum was made a few hours only, after they were used, so that no doubt should ever come over the witness's mind upon the subject. He had no doubt then, he has no doubt now. There is no variance in his testimony, at different times, when he has been called. He has long been in the governor's staff and was perfectly at home in his duty. It was no new scene of anxious agitation with him, but one with which he was as perfectly familiar, as with any of the occurrences of his life. On the other hand, Capt. Sargent was a new and younger officer, acting, that day, for the first time, as a commissioned officer, under a commission but ten days old. He received the order while the company was on the march. He was evidently agitated at the time he received it. He did not understand it, when it was first communicated, and asked, very properly, for a repetition of it. He thought he then understood it, and delivered it to the Respondent, who, by his letter, evidently correctly understood its meaning. But although he correctly delivered the order then, what is Capt. Sargent's recollection now ? not *in half an hour*, as he told the Respondent ; but passing intermediate scenes, after he heard of the arrest, and not till then, knowing its importance, the first impressions he received prior to the repetition of the order were awakened, and then he thinks he recollects that the order meant for the report to be made *in more than half an hour*, or *half an hour and more*, using the word *more* for *after*, which in common parlance is not a very wide mistake. The *first time* he testified, when asked what order he received, his answer, very prudently, was, "*My impression is*, it was in more than half an hour, or half an hour or more, *I do not know which.*" I say, very prudently, because he could not tell which the *precise words were* ; but repeated them in the alternative, and with proper caution, added, *I do not know which.* But as the mind of any one who is continually considering and speaking on the same subject will naturally settle down into a more fixed belief of the occurrences related, he, in his *last* examination, several days after the first, having been in court much of the time while these orders were the subject of discussion, becomes more confident in his belief, and says *he is positive.* But positive of what ? the very words ? *no*, he is only positive of the words of the old alternative, "in more than half an hour, or half an hour or more, I cannot tell which." The whole of Capt. Sargent's testimony, therefore, including the correction of it in the morning when the record was read over, by saying, the words

were, *in half an hour or more, or half an hour and more*, instead of the words he used in his testimony in chief, must be taken as expressive of his design to swear to the *purport* rather than the *words*, the more especially as he expressly reserved himself on that head when he repeated the words in the alternative, by saying, "*I do not know which.*" The weight which is to be given to the testimony of two witnesses who are at variance on the same point, must be determined as much as anything by the fact, that one undertakes to say *positively what the order was*, and *what was said*, and the other expressly reserves himself, on that point, by stating what his *impressions* were only.

But the Respondent is not content with having Capt. Sargent let off in this manner, but brings him up, whose own recollections are thus imperfect, to prove that Col. Quincy's is more so. This makes it necessary for the Complainant to go further and show other circumstances which prove the incorrectness of Capt. Sargent's present recollection, and he will cite one in particular which shows that Capt. Sargent did not *at the time* understand the order to mean as he has testified now it did. I refer to that part of his testimony which gives an account of the arrival of the company at the Exchange the first time. "As soon," he says, "as we arrived at the Exchange, *the half hour having nearly expired*, it being about twenty minutes, I suggested to Col. Winthrop to send up an officer to the church" &c. In answer to a question, the witness says, in another part of his testimony, that there was a conversation between him and the Respondent and that the latter inquired of him what Col. Quincy meant by "*after half an hour*" &c. It seems their cogitations did some good and that they both construed the order correctly at the time; for, in the language of the witness, "*the half hour being nearly expired*," the one suggested, and the other approved sending an officer up to the church, which, the witness says, "would not have been done without."

Although it is disconnected with this part of the case; but as it goes to the weight which ought to be given to a witness's recollection of the events he relates, and who is brought to contradict the direct testimony of another witness, it is necessary for me in this point of view to refer to the Respondent's witness, Clark's testimony respecting the relative position of the company and the procession, when the latter turned from Milk into Washington Street. Clark says, that he stood at the corner of Morton Place and the Mansion House. "He heard a drum, and very soon after saw a number of persons come out of the door of the

meeting-house. The governor was among them. They paused a little while, not half a minute, and turned up the street toward Washington Street. Before the procession had turned the corner, he saw the Cadets make their appearance" &c, and afterwards, he says, that he meant by saying the procession "the head of it." The inference from this precise testimony of Mr Clark, who stood at the elbow in the street, whence he could see both the procession and the Cadets, is, that just after the Cadets came into view, in the street below where he stood, the head of the procession turned out of it, above. Now let us hear Capt. Sargent upon that point. "As the company arrived *nearly opposite the Mansion House* in Milk Street, in sight of Washington Street, I *observed* the *governor and suite* just turning the corner of Milk Street into Washington Street." Why that is the very place where Mr Clark stood; and if Capt. Sargent is correct, it is strange Mr Clark should place the Cadets and the procession twice the distance apart he need to have done, say 40 instead of 20 rods, when the very object of calling him was to show that the Cadets were but a moment too late. Mr Clark, from his position and his having no other object to engage his attention but this, is not likely to have been mistaken; while Capt. Sargent, it is presumed, was engaged about the concerns of the company, and was so anxious to overtake the procession, that, if he saw it at all, it must have been the foot of it. They are both the Respondent's witnesses; and, I will leave it for the court to decide, whether there was not a sort of hallucination in Capt. Sargent's sight, as there evidently was about the terms of the order, in his memory. *Even Braman* contradicts Sargent, but wherein, the Complainant will not now relate, as he should place no more reliance upon that, than he should upon Reed's contradicting Quincy.

Third. What was the understanding of the *Respondent* of the order which Capt. Sargent gave him immediately upon its reception. Instead of more than half an hour, or half an hour and more, it is plainly and simply what is conveyed by the words, *in half an hour*. If there is any proof of inaccuracy of recollection or confusion in the mind of a witness, it is, that he relates an order at the time correctly, which he afterwards cannot recollect in the terms he received or communicated it, and which at the time he testifies he cannot undertake to say what its terms really were. So far as the memoranda made go to corroborate their testimony, it will be recollected, Col. Quincy's were made at the time, and by himself, and Capt. Sargent's three or

four days afterwards, not by himself, but by another, and that the Respondent's counsel with a view to obtain the means of defence.

We come now to the consideration of another point, of simultaneous occurrence, which the Respondent considers of some importance, viz. the *conversation* which passed between Col. Quincy and Capt. Sargent at the time the order for reporting was given. Col. Quincy says, "my impression is, that after delivering the order, "I added some words of my own, concerning the necessity of being on the spot at the conclusion of the exercises of the church." There is no pretence that what was said on that subject proceeded from the commander in chief. On the contrary, the witness expressly negatives the supposition by saying, *I added some words of my own*. That what was then said was understood both by him and Capt. Sargent, as individual remarks and had no connexion with the order is proved by Capt. Sargent's testimony in chief, who, when called upon to relate the occurrences of the day, after reciting the countermarch of the company at the door of the church, and their consequent march down Milk Street in column, thus speaks: "Col. Quincy passed through the music and the first company, or section, and gave me an *order* for Col. Winthrop, which was for the company to report themselves in more than half an hour, or half an hour and more, I do not know which; *which order* I reported to Col. Winthrop at the first halt, which was opposite, or a few feet beyond, a narrow passage way at the east end of the church, and nearly opposite Mr Brigham's house." Here is the whole answer, giving an account of the order which he received and communicated, in reply to the question put. To the next question by the Respondent, which was, "State the whole conversation which passed between Col. Quincy and yourself," he gave this answer: "after Col. Quincy had first given me *the order*, fearing I did not understand him, I requested him to repeat it, which he did, as nearly as I can recollect, as I have before stated. *My impression* is, he also added, that when we reported ourselves at the end of the half hour, he would be out himself, or send out and give us further orders. I have no recollection of anything more passing between Col. Quincy and myself."

—"Question by Respondent. How did you report the *order* to Col. Winthrop?

"Answer. I reported the *order* and the *conversation*, once, as I before stated at the first halt," &c. Captain Sargent's cor-

rection of his testimony the next morning in relation to the time of reporting, makes the same distinction between the *order*, and the *conversation*, or *what* Col. Quincy said as from himself.

The state of facts is not altered materially, as it regards the point in discussion by the testimony of either witness, when called again to the stand, towards the close of the proceedings. Some other circumstances are added, as the court will see, by recurring to the record of the evidence; - but they do not vary the facts relating to the point in question, any further, than it is done by Col. Quincy's recital of what he did say, and denial of what Capt. Sargent supposed he said, and Capt. Sargent's re-assertion, that he understood Col. Quincy's *conversation*, as he had before recited, and that he so reported to Col. Winthrop. But the court will see no such thing in Col. Winthrop's letter; and it was too material a fact to have been omitted in a letter, written the very evening of the transaction, for the purpose of exculpating himself from blame. If Col. Quincy had undertaken to be out, or send out, when the company reported, or if Capt. Sargent had reported so to Col. Winthrop, nothing would have been more natural and proper, than for Col. Winthrop so to have said to the governor, by way of excuse for himself. But what does Col. Winthrop say? In reciting the order of events of the day, he speaks of the general order he received; his obedience to it, by reporting at the appointed hour; his delivery of the escort at the church, and then adds, "I was *ordered* by Lieut. Col. Quincy, through my adjutant, Capt. Sargent, to report myself at the church, in half an hour; I did so, and remained there fifteen or twenty minutes. No order came. I was then compelled by the intensity of the weather," &c. Here is an acknowledgment of the *receipt* of the order, through *whom* it was received, the *purport* of the order, &c; but not a word about any additional order, as the Respondent now considers it, that Col. Quincy would be out or send out, when they returned to the church; nor, was there any intimation in his letter, that such a *private conversation* had passed between Col. Quincy and Capt. Sargent, which had been reported to him, and had, in some degree, influenced his conduct.

After the occurrence which has given place to this proceeding, it appears, that the governor returned to the council chamber, where Col. Quincy made the memorandum of the words of the order he gave at the meeting-house to the Respondent, no doubt in consequence of his excellency's inquiry what that order was, before he directed the arrest of the Respondent.

Can it be possible, if Col. Quincy had said to Capt. Sargent, what that officer gives as his impression that he individually told him, "he would send out or go out when the company returned, and give them further orders," that it could have escaped Col. Quincy's recollection; or, that he would not have related that *fact* to the governor, as well as the *words of the order*? It was a fact, if it existed, that must be developed on the trial, if one was ordered, and if he had had any disposition to conceal it at the time, he must have known it could not be long concealed, and that the very attempt at concealment would recoil upon himself. It is clear, therefore, that every motive of interest, as well as honor, must have led it to its exposition. No one, who knows Col. Quincy, can suppose, that being in the governor's counsels, as he was at the time, called upon to report the orders he had given, and learning the governor's purpose of arresting the Respondent upon the facts contained in that report, which he, from his situation in his staff, must of necessity be the chief witness to prove, I say, no one for a moment can doubt, but that a circumstance of so much import and bearing on the intentions of the party would have been made known, if it had occurred. Besides, why should he have done so? Why should he have said he would *send out* when the order was for the Respondent to *send in*? Why should he assume the responsibility which attached to another's situation? We all have responsibilities enough of our own, without assuming those of others, especially without a request to do so, or any possible motive to induce it. But if he said so, why did he not do it? Can there be any possible reason for the omission which was not equally applicable to the promise? Certainly not; but every motive to the contrary. It must, therefore, be inferred from all these facts and circumstances, that Capt. Sargent, whose recollection of the purport of the *order* he received at the church from Col. Quincy, and delivered to the Respondent, was so uncertain, must also have *misapprehended* the *conversation* which passed between Col. Quincy and himself at the same interview. But whether he did or not, it is apparent, the conversation which Capt. Sargent reported to the Respondent, according to his own account of it, if it was even in the terms which he has stated, was only reported and received as the friendly intimation of an officer, who was willing to do everything in his power to make the duty of the company pleasant, and that what was said, was not relied on by the Respondent, at the time, as a ground of exculpation, as it would have been, if viewed in the light in which the defence now presents.

Hence it is manifest, that the order given by Col. Quincy (however Capt. Sargent's testimony may be viewed) for the Respondent to report after half an hour, is proved. The breach of the order is established by the fact of the Respondent's omitting to report, and the absence of the company at the time the substantial object of that report was to be accomplished.

There are two points of examination which require a passing remark, in considering this specification. I refer, first, to the *supplementary excuse*, for not remaining at the church, which the Respondent's letter contains, which is stated in it in this manner. "There is another reason, besides the intensity of the cold. I was requested to make way for a funeral that was just assembling in Milk Street, and which extended from Federal Street nearly to Washington Street. It would have been impossible to have conducted the funeral with decency, if I had remained with my company in front of the church. As it was, the horses were *alarmed*, and considerable confusion ensued."

This circumstance by the evidence, appears to have been magnified beyond its merits, and to have been very incorrectly stated by the Respondent, according to the account of the witness, Mr Lepean, whom he brought to the stand to prove it. Why he brought him to contradict his chief witness, Capt. Sargent, in a most important particular, the Complainant cannot imagine, without he thought the evidence in his case was *suspiciously strong*. If it was for that purpose, he is a good witness; for Capt. Sargent says, the horses' heads, of the carriages attending this funeral, were *up* the street, and Lepean says they were *down*. So we will leave it to them to settle the contradiction in which the Respondent's inquiry has placed them, and ask what effect this witness's evidence has upon the statement in the Respondent's letter, upon the point of interruption to the funeral solemnities, its most important particular. The letter says "the funeral extended nearly from Federal to Washington Street." Near Washington Street, is the place where the company stood, and so near to which did the funeral extend, according to the letter, "that the horses were alarmed, and considerable confusion ensued." The witness says, the funeral extended "from near Federal Street to the Mansion House," about ten rods from the front of the church where the company stood, and the horses' heads were *down the street*. It is not probable that hack-horses, standing with their heads *from* the company, at that distance, would have been much alarmed, if the company had remained there all day. The cause of the alarm must be drawn

from the evidence of another of the Respondent's witnesses, who said that when he moved away, on account of the funeral, he moved "down Milk Street," which was *by the whole length of the carriages, and in the course the funeral was about to proceed*. As the request to move, asserted in the letter, to have been made, is no nearer proved than that one of the witnesses heard a man speak to the Respondent; but what about he does not know; it seems to be beyond a reasonable doubt, that the statement that the company moved away on account of the funeral, was an unfortunate statement, as the evidence now places it. For if the Respondent moved away at request, to avoid disturbing it, it appears he took the wrong direction to accomplish the purpose, and that the "*alarm and confusion*," (a characteristic of this day's proceedings,) *were produced by the Respondent himself*.

Next let us inquire what weight ought to be given to the other position of the Respondent, which amounts to this, that because the governor did not send out to him, when he came to the church, *once, yea, twice*, "and no order came," that he was not obliged to wait any longer, under all the circumstances, and therefore was justified in going away, and as he did the best he could, he is not to be blamed for being three minutes too late.

Did he do the best he could? that is the question. Did he even exercise the discretion *properly*, which he claims, to march off a quarter of a mile to the Exchange Coffee House, after the services had continued a very unusual length of time, when he might have run into the Mansion House, but ten rods below the church, and been within either "beck or call" when the service was over? Was that sound discretion? Was it common prudence? The Mansion House belonged to the family of the Respondent; it was the house in which he was born; he knew the width of the entry, the hall, and the extent of the rooms on the lower floor, and has brought the keeper of the house here to give the information to the court. But his excuse is found in the reply of Mr Coggeshall, who says, "if the company had applied to me for accommodation that day, I should have refused the offer, as it was not in my line of business." But he does not say he would have refused them entrance for a few minutes. Under the circumstances, he might have relied on Mr Coggeshall's known hospitality that the company would not have been refused permission to stand round, at least, *one stove*, (which is all they had in the room at the Exchange,) or, at any rate, to stay a few minutes *within doors, under cover*,

and on a *dry floor*, and to have permitted the musicians to thaw out their instruments *at his bar*, which they could have done, as well as at the Exchange.

Viewing such extraordinary circumstances as these, as they ought, the court will decide upon the merits of these specifications by the evidence.

1st specification, 2d charge. This specification sets forth the issuing and delivering of the general order of December 24th, and avers that a procession of the civil authorities was formed at the State House, for the purpose of attending public worship at the Old South church, and returning thence to the State House, as is usual and customary; that the Respondent reported for the duty required of him and was ordered to take up the escort of the procession; it then sets forth that his duty was to escort the procession to the church and there to have remained until the services were over, and then to have escorted the procession back to the State House; alleges the Respondent to have been conusant of the custom, and assigns as a breach that he marched off, and was not present to take up the procession on its return, as his duty required.

This specification is founded on the general usage of the civil government to attend public worship on Election day, of which the Respondent was conusant, and upon the orders of December 24th, by which he was ordered to do the escort duties of the day, which he failed to perform.

I believe there can be no doubt of the facts set forth in this specification being in full proof before the court, and I will leave its support upon the evidence, of which there is sufficient upon the record completely to establish it.

The 2d specification of this charge, containing substantially the same facts, sets forth the same orders as are stated in the 2d specification, 1st charge, the custom of performing escort duty, and the breach in the neglect to report and take up the escort back to the State House.

The same evidence is relied on for the support of this specification, that was offered in support of the 2d specification, 1st charge, and it is full and irresistible, clearly establishing the fact of neglect of duty in not reporting and performing the services which his orders and the established usages and customs of the occasion required.

The Respondent in his defence makes one remark under this head which he has omitted under others though equally applicable to them all. He seems *here* to take one exception,

there another, and finally to fill up the book with technicalities, which are the last thing a court martial ought to have anything to do with, and which, if they are intended to perplex and embarrass the court, I am sure, will receive but little of its notice. The observation I allude to is one of this character. It is that Col. Quincy's testimony is, that the *company* was ordered to report, and not the *Respondent*, and therefore the offence is not proved. Just as if an order to a *company* to report, is not an order to its *commander* to make that report. In military matters this is well understood. The court need no counsel from the Respondent about it, nor is it probable they will take any of the kind which is voluntarily proffered.

With the wonderful sagacity developed in this defence, it is a matter of astonishment that the Respondent has not discovered that there is no order to *him* in the general order of 24th December, but that it was an order to his *company*, issued two days before he was chosen to its command. How can *he* be bound to obey an order given to a *company*, to the command of which he was not even chosen at the time the order was issued ! As there is so much *urbanity*, and *candor* discovered in the defence, the Complainant feels it his duty, in some measure, to requite it, by candidly stating this omission, which, upon the Respondent's supposition that an order to a *company* is not an order to the *officer* commanding it, is more fatal to the government in this prosecution, than any ground which the Respondent's advisers have yet taken in their voluminous argument.

3d specification, 2d charge. This specification does not so essentially differ from the second as to require repetition ; the only important variance being that the time for reporting is "*in half an hour*" in this, and "*after half an hour*," in that ; and a clerical omission by which the Respondent attempts to evade the subject of this specification, fastening on the omission of the Respondent's name at the close of the paragraph, in which it is stated, that the procession had been formed after the organization of the legislature, so that he would have it read that the procession *was ordered to escort itself* down to the church, as it had to do back from it. Can it be believed that the Respondent's advisers seriously think that the whole specification of a charge is to be judged of by a single part, or that the maxim "*he who fails in a letter destroys his case*," which for centuries has been exploded in courts of law, is to be revived in a court martial ? All that is necessary to be alleged is *substantially set out* in this very specification, which involves no such

absurdity as is supposed when examined with its context. In the commencement of its introductory portion, it states, that a general order was duly issued on the 24th of December, and transmitted to the Respondent, "by which he was ordered to perform escort duty on the day of General Election," and was therein directed to repair to the State House, at noon of that day, &c. The specification then sets forth the forming of a procession at the State House, and after the procession was so formed comes the words "ordered to take up the escort thereof." Does not the antecedent, remote indeed it may be admitted, clearly show *who* was ordered to perform that escort duty. If that were left in doubt, the language immediately following cures the omission, it declares, "that, having taken up the escort, *he* conducted the same to the Old South meeting-house, and was there further ordered to be ready with *his* company to report *himself* for escort duty, *in half an hour*, whereby it became the duty of the said *Lieut. Col. Grenville T. Winthrop*, commanding officer as aforesaid, to have been present &c." Does this leave in doubt *who* escorted the procession, and *who* was further ordered? Can the pronouns "*he*" or "*himself*" stand for the procession, or be, by any fair implication, so understood? It is most abundantly manifest in comparing the different passages, the one with the other, that there is sufficient certainty as to the *person ordered*, as well as to the person omitting to perform the order. The meaning and intent of this introductory part of the specification is to be obtained, like that of any other instrument, by taking the whole subject matter together, and not by detached or isolated portions.

After dragging through the voluminous pages of a *harsh argument*, the Complainant really confesses he felt great relief at reaching one in which there was *great good humor and pleasantry-discovered*. It was so much like coming to a smooth place, after riding over a new McAdamized road, he almost regretted that the clerk had not made a few more such harmless mistakes; and he can now only express his surprise that when so many pages of the Respondent's argument are taken up about immaterial circumstances, that this, which one would have thought would have required a dozen pages at least, should have been passed over in a single one. It shows how much more legal acumen is required to make truth appear like falsehood, than error what it is.

As all the facts of this specification are alleged in the second, the omission of the name, in this, is of itself but of slight conse-

quence ; but as this seemed to be a case which required a little metaphysics, lest they should be all on one side, the Complainant thought he would somewhat indulge himself in them ; and if he has done it successfully, he would add, that the support of this specification rests upon the evidence which maintained the last, excepting that the *time for reporting* is proved by the *letter* before referred to.

3d charge, Unmilitary Conduct. The 1st specification sets forth the issuing and delivering of the general order of the 24th December, requiring the performance of escort duty on Election day by the Cadets, the report of the Respondent under it, his taking up the escort of the government in procession, for the purpose of attending public worship at the Old South, as is usual and customary on Election days, and of returning back to the State House after the services are over, of which custom the Respondent was conscious ; that he did escort the procession to the meeting-house, and after delivering the procession, without leave or authority marched away therefrom, and while so marching away received another order to report himself at the meeting-house with his company for escort duty after half an hour, that he afterwards returned to the meeting-house and after halting a short time, but without reporting, or leaving behind him an officer to give information where he was going, so that an order could be communicated to him, marched off again ; and after again returning and halting, but without reporting or receiving permission so to do and without leaving an officer to give information, &c, marched off again, and did not return in season to take up the escort to the State House, and was not present to receive an order which was sent for that purpose, &c, by reason of which the commander in chief and other members of the procession left the meeting-house, without being received and saluted at the door of the meeting-house, and without being escorted back to the State House with the form and ceremony suited to the occasion ; all which conduct is unmilitary and unofficerlike, and contrary to the rules of military etiquette and propriety, and unbecoming an officer of his rank and station.

This specification alleges *numerous acts* of the Respondent, as the ground of the charge, which are unmilitary and unofficerlike ; *all, or a part of which* may be found and the specification supported. The first is, that the Respondent, after delivering the procession at the meeting-house, marched away therefrom, without any order or authority to do so. The fact that he did so, rests upon the evidence adduced in support of the

1st charge, and has before been considered. The next is, after receiving an order to return in the time limited and report, he returned, but, *without reporting*, and upon his *own responsibility*, went off again. This was repeated again and the consequences followed which ordinary foresight would have anticipated. If all, or either of these acts were mere acts of indiscretion, the Respondent must answer for them. It is contrary to all military rule that a military man shall exercise any discretion at all in the execution of an order, without an express authority to act according to his judgment. His orders bind, and his orders justify him; and if an officer is under orders which operate unnecessarily hard upon his men, it is his *duty* to report the circumstances to his principal, that he may obtain relief for them, whether he is ordered to report or not. Such was the situation of things this day. The weather was very cold; by the meteorological tables the mercury was 13° above 0 in the shade at noon, not at 0, as the Respondent says; and although all the young men doubtless took the precaution, that some of them testified *they* did, of clothing themselves with thick additional garments, yet, the mere act of standing in the snow was dangerous, and the duty of their commander was to have made their sufferings known, and to have obtained relief for them by *reporting*, whether he had received an order to do so or not; but when he was under express *orders* to do so to the commander in chief, who knew the state of the weather, well, though he could not know that the company were suffering by standing in the snow, there was no excuse for keeping his men exposed in direct violation of the orders he acted under. His duty to his men required this. His duty to the government required it also; for by making report, orders would doubtless have been given for the company to repair to some convenient place, and there to have remained without further exposure until their services were wanted. But instead of this, they were left standing 10 or 15 minutes the first time, then marched through the snowy streets as long; then returning and standing on the snow again, as long as before, and then marching off without any one's knowing whither they had gone, so that when the inquiry was made at the door of the constables and people by Col. Quincy, no one could tell in what direction to look for them; for *the faithful Braman*, to whom alone the secret was confided, had gone away without making it known to any one where, except to Mr Robinson, and *he* says when he spoke to Col. Quincy of it, "he does not know whether he heard him or not, as he made no answer."

The Respondent asks "why this charge was inserted ; unless to multiply accusations that were not relied on, nor expected to be proved ; or in hopes that being accused of *much*, the Respondent might be judged guilty of something." Judged guilty, without evidence ! If the Complainant had ever entertained the unworthy motives which are here imputed to him, he hopes his own self-respect, would prevent the disclosure that he was influenced by them ; and, if he should ever be so unfortunate as to be a respondent, and his complainant came into court upon the doctrine of chances, and brought charges that were not relied on, nor expected to be proved, that he never should be guilty of the indiscretion of imputing to the court that was to try him, the supposition, that their judgment might be so influenced.

But to the merits of the Respondent's inquiry, "why was it alleged that no actual report was made when the company returned to the church ?" For the plain and simple reason, that being under orders to do so, the Respondent might have relieved himself from all responsibility by obeying them ; and, if, in doing it, the public attention should be attracted from the services of the church, the impropriety of the measure would not have fallen on him who obeyed the order ; but on him who gave it.

When an order is given for a company to repair to a certain post, the first duty of its commander on arrival is to report. The order in this case was not an order of mere dismissal from duty for a given time, implying that the company was to be back at that time and remain to resume the escort, as had been usual before the day of Election was changed from the mild season of May to that of the inclement January ; but the order to the Respondent was direct for him to be back with his company *and report*, the object of which report was that the governor might judge what further indulgence of time, if any, could be granted. If it be said that the *time of reporting* was shorter than usual, the reason of it might be found in the events of 1828, where, by Col. Baker's statement, an hour was too long. The Respondent's excuse for neglecting to report is, that he could not have reported without sending Capt Sargent into the church to the disturbance of the congregation. What more impropriety was there, let me ask, of Capt. Sargent's coming *into* the church, than of Col. Quincy's *going out*, as the Respondent elsewhere supposes he should have done, according to his promise. It is a bad rule that will not work both ways.

Why, if the Respondent's dignity would not have been offended by receiving a "*whisper* from a *constable*," ought he to suppose that other officers would have been, who are in the habit of speaking to *civil people*? Could he not have sent a constable in without disturbance? Who noticed any in the church on the day of the Centennial celebration by this course of proceeding? and yet reports were made and messages sent *in* and *out* during the services on that day, as they might have been on this. Whose fault was it, under these express orders, if the men were kept suffering in the cold? The governor, by his order, assumed the responsibility of their relief from exposure when he should be made acquainted with it; and the Respondent took that responsibility upon himself, by not complying with the order given him. Better would it have been, if the *whispering constable* was not at the door, that the *active Braman*, who was stationed there, should have been sent up with the message, or even that Capt. Sargent himself should have bristled up the aisle, than that the health of the young men should have been exposed by standing in the snow as long as the Respondent kept them there. But does the Respondent seriously suppose that the accomplished gentleman whom he would have charged with the message would not have performed that duty in a manner consistent with the decorum suited to the occasion? What well bred man would have done otherwise? What *military* man would have *dared* to have done otherwise? It would have been such an offence, as no man, civil or military, who has any respect for public opinion, the great arbiter of right and wrong in this country, would have committed. The Respondent himself has not assurance enough thus to violate it; and if he had sent Capt. Sargent, as he has represented him in the performance of this duty, "*clattering* up the *broad aisle* in the midst of the *prayer* or *sermon* to present his sword to the *governor*, or to Col. Quincy, to inform them that the Cadets were waiting for further orders," that gentleman would have replied, in the language of respectful reproof, I will do the message, sir, but if it is to be done in that manner, I beg you will send it by some one whose sense of propriety better accords with your own.

An officer in command of an escort in the militia is in the relative situation of commander of a guard in actual service; both are under the command of the officer receiving its honors or requiring its protection. The officer guarded, therefore, directs the whole operations of the guard. It cannot move but by his orders; and it is a duty which requires the strictest ob-

servance of them. Were it not so, it would be better that the commander of the guard should be sent to reconnoitre, than the officer whom he has under his protection.

Escorts of honor stand upon this ground ; and if the officer in command of the escort is to exercise his discretion in conducting it, instead of its being a guard of *honor* to the *person* escorted, it may be of dishonor, as it has sometimes happened. It is the very nature of such an escort that it obeys the will of the person who is the object of it. He alone can tell what his own wants and purposes are ; he is not obliged to communicate them, and if he does, he has a right to change them at will and his escort is to be always at hand to act conformably. Suppose, on the present occasion, that the clergyman selected to preach the discourse had been taken sick, either before the arrival of the procession, or during the services the government went to attend ; in that case the procession would probably have returned to the State House, either immediately, or shortly after it entered the church. But would it have returned in the order in which it went, and in the usual and customary manner, if the Cadets had marched away through the streets, and were not to be heard of ? If the officer in the immediate command of the escort acted discretionarily, this might happen, and it shows the necessity of the escort being under the command of the person escorted, who is the best judge of the emergencies or probable circumstances which may control his conduct. The very circumstance of the clergyman's substituting a benediction for the concluding prayer, which has been frequently omitted on public occasions of late years, and which ought to be anticipated when the sermon is of unusual length, (an omission which it is said occurred on this occasion, although the Complainant does not now recollect there is any evidence to that point,) shows the necessity of the escort being at hand to guard against such a contingency ; and it is no excuse for its commander to say, that, if the services had been longer, he should have returned. When it comes to that, the commander of the escort will be the master of the day's ceremonies, and will direct the whole course of proceedings and the time that shall be consumed in their performance ; and perhaps, it is not improper for the Complainant here to say, that, if the pretensions now set up are admitted, the principle will soon become one of practical operation.

It is said in the defence, and not denied, that the adjutant general knew that the company intended to partake of a collation at the Exchange. But did it thence follow, that, after they had

returned from their repast, they would go back again to the same place. Such a supposition would have been erroneous, for when they marched away the first time they did not go there, but paraded through some of the principal streets of the city; and when they marched away again, it was to be presumed that they would have proceeded through others, for the sake of motion and public parade, which, with their new officers and uniforms, it is natural to suppose, would have been peculiarly gratifying to their own pride and the public expectation. Having marched around the city once, as it was known to the people at the door, they would be likely to know the company's destination the second time better than those within; but neither they, nor the adjutant general, had the least surmise, that, at that time of day, on such an occasion, they had gone into *winter quarters*. But this is not all; the Respondent seemed to have lost that discretion to the exercise of which he was prompted by his adjutant in the first instance, and which, it was almost impossible to suppose, should not have been continued. Mr Murdock was left in the meeting-house, the first half hour, when there was little probability of the services closing. Why was he then taken away, and no one left in his place? Was it not more probable the services would close the second half hour, than the first? and the third than the second? and the fourth than the third? and yet, against all these probabilities, amounting at last to *almost a certainty*, neither adjutant nor other officer was left to tell where the company had gone, to receive a communication, or to send a message. But why was Mr Murdock left there at all? Mr Murdock is as good a soldier as ever stepped the ground; but he was out of his place in church, on this occasion. Capt. Sargent was the proper organ of communication. Was Col. Quincy to inquire of every member of the company who might appear in church, whether he came for a message? How could the governor know that Braman was deputed there upon such an errand? The Respondent might as well have sent William Garfield, his domestic, there, and then have complained that the governor did not notice him. It seems to be, on reflection, beyond all reasonable supposition, that an officer, standing in the responsible relation the Respondent did to the whole government of the commonwealth he had escorted on a day of ceremony and great public observation, should have so trifled with his responsibility. No one can suppose but that the commander in chief, and the whole procession would have waited longer than they did, if they had been informed of the probability that, by

doing so, the order of the occasion would have been preserved. But when, after Col. Quincy's protracted absence, at a time when every minute seemed an hour, no tidings were brought of the escort, the restlessness of the whole congregation, which could not be controlled at that late hour, created for the governor the necessity of the immediate decision, whether, in going out of the church, he would precede the congregation or they him. It is now, however, said, if the governor had waited only *three* minutes longer, the company would have been there. How did he know that? How did he know, how long he should have to wait? and wait at last in vain, perhaps? How did the governor know that the Respondent had not waited as long as he thought his duty, under the circumstances, required, and had retired from service for the day? This was the first time the Respondent was in command on a similar occasion, and the governor was not acquainted with his sentiments and notions of propriety on such occasions. How could the governor know that this was not even an intentional absence? It was impossible for him to tell; and was he to wait until that could be ascertained? The answer to all this is, he ought to have been informed. The proper officer ought to have been left to give information. It was an act of disrespect in the Respondent to place the whole assembly in a state of so great suspense and anxious solicitude. It was an act of culpable neglect, as is settled by the proper answer which every military man would give to the inquiry, whether it was the governor's duty to have waited for the Cadets or theirs for him? Not *his*, most certainly. But his excellency, never wanting for courtesy, did wait some time; and if he calculated, as the Respondent did, about the length of the sermon, that the longer it lasted the longer it was likely to last, he waited long enough to know it was time to move.

The Respondent will not say he *did not know what the order to report meant*; and if he does, it will not avail him, for every man who takes a commission is bound to know its duties. But he did know; he had acted under a similar order to report at the State House that very day; and how did he conduct under it? When he arrived there, did he wait in front of the State House until "the fife split with the frost" and march away; and, on coming back again and finding that his excellency was not on the steps at the appointed time, march off again? or did he not, on the contrary, send his adjutant up to the council chamber *to report immediately on his arrival*? The Respondent therefore was not only bound to understand what an order to

report meant ; but his conduct, at this time, shows that he actually did understand it, and acted accordingly.

If it be said that Col. Quincy and Col. Baker have heretofore understood the orders at the meeting-house as meaning that the Cadets must be there when the services were over, it is answered, that that it is not the question to be settled. It is not what those gentlemen understood ; *but* what the *order itself meant*. The opinions of others on former occasions, under different orders, at a milder season of the year, ought not to have influenced the Respondent's conduct, if they had been communicated to him ; but it does not appear that they were. A military man is to observe the orders given to himself and not to others. As has been said, the order was definite, as to *place, person, time* and *object*. Now suppose the *time* fixed for reporting had been two hours instead of half an hour, would not the order have been successfully pleaded in the Respondent's defence, upon a charge of absence at the time the services were over a quarter of an hour before the two hours expired. If that is incontestable, it certainly shows, that the order had some meaning to it, and what that is must be drawn from its terms.

Another point of new doctrine is advanced by the Respondent in his letter to the governor of 4th January, which requires only a passing observation. It is this, "that the whole letter must be taken together ; and if it proves that the Respondent was *required to report*, it also proves that he *did report*." If it were not correct, that one part of a confession might be received as true, and the rest disproved by other evidence, how easy it would be for any guilty person to confess the act with which he is charged and with it a justification, and thus defeat the ends of justice ; but there can be no doubt, that if there be other evidence controlling the justification, it should have its weight, leaving the confession to be considered like other evidence. The letter shows that in whatever terms the order given by Col. Quincy was delivered by Capt. Sargent to the Respondent, *he* understood its meaning to be as it is stated in this specification. But the evidence most clearly establishes the fact, that no report was made according to it ; unless, as has before been said, it was made by the act of coming up to the front of the church and halting. Indeed, the letter itself, taken altogether, goes to the same point, for the Respondent's complaint is, that when he marched up to the church "*no order came ;*" as if it was his excellency's duty to report to him, not he to the governor. "I went away, and came back again, *still*

no order came." The complaint seems to be something like the defence, that the governor was not sufficiently subordinate to the commander of his guard. It is virtually this, your excellency fixed your own time for me to come up with my company; why was you not there to receive me? I marched round town, to give your excellency a little further time, and came back again. "Still no order came;" your excellency was not there, your aids were not there, the members of the company "told me their fingers were so cold, they could not handle their muskets," and the musicians that they must go to some fire and thaw out their instruments, and I marched down to the Exchange, and meant to have been back again, notwithstanding your excellency was so contumelious, but, as I did not get back in time, you, who have been so deficient in duty yourself, have no right to complain of me.

The only question now to be considered, is, what effect *the supposed extenuating circumstances*, which the Respondent has taken so much pains to spread upon the record, ought to have upon his defence. The answer is, none upon the *finding* certainly; for the order was *given, received* and *broken*; the *fact of disobedience* is therefore placed beyond all doubt;—the Respondent must be found guilty upon this specification, or the bearing of the evidence is not rightly understood by the Complainant. Their only effect must be upon the *sentence*. But even this the court will not mitigate, unless the Respondent's situation was such, that he was *obliged* (a voluntary act would not justify it,) to assume, himself, the responsibility of his men's exposure. Nothing can justify a breach of an order, but inevitable necessity, or circumstances without the control of the offending officer. But extenuating circumstances may justify a mitigation of the sentence. In this point of view only it is, that the Complainant respectfully requests the attention of the court to the distinction which the Respondent's argument does not recognise. The act of disobedience is admitted, that is, unless the mere act of marching up to the front of the church can be called a report within the terms of the order. That, or any other company, might have drummed by the church during the services; but was the governor to send out and inquire whether or not it was the music of the Cadets he heard, and whether they had come to report or not? or were they to make their intentions known. There can be no question upon the point of duty, and the breach of the specification is either technical or substantial, according as the court shall decide the question of responsibility before at length considered; and with them I leave it, confident that the ground upon which it has

been placed, the evidence in the case will support, and that the burden of the responsibility will rest upon the shoulders which ought to bear it.

2d specification, 3d charge, sets forth that the Respondent being under the orders of 24th Dec., having reported and taken up the escort, and delivered the procession at the Old South meeting-house, there received an order to report *after half an hour*, and having neglected to be in readiness at that time, with his company, to take up the escort of the procession back to the State House, according to custom, &c, and not having returned to the meeting-house for so doing until after the services were over, and most of the members which composed the procession had left the meeting-house, and the governor and a part of the executive council and some few other members of the civil government of the state had proceeded some way, returning in their usual course on such occasions, towards the State House, the said Lieut. Col. Grenville T. Winthrop, then and there, with the company under his command, in a disorderly and unmilitary manner, ran through the streets, with a view to intercept the governor and commander in chief and other members of the executive council and civil government who were with him in their way to the State House aforesaid, and did actually intercept him and them in their course to the State House aforesaid, in the public highway, near Park Street meeting-house, in said Boston; and without making any explanation, or offering any apology for his previous neglect in not taking up the escort at the said meeting-house, and without requesting permission then to take up the same, did, in an unmilitary and unofficer-like manner, order his company in front of the commander in chief and other members of the government aforesaid who accompanied him, which said company, in obedience to said order, attempted to form in front of his excellency and the other members of the government who were with him, and thereby impeded them, and obliged them to change their course from one part of the street to another, in order to return to the said State House; all of which conduct on the part of the said Lieut. Col. Grenville T. Winthrop was unmilitary, unofficerlike, and highly disrespectful to the commander in chief and other members of the government who accompanied him, and had a tendency to bring the militia into ridicule, and the military forms and ceremonies of the government on the day of General Election into contempt.

In considering this specification, the Respondent says, we come now to another accusation, the charge of a disorderly and

unmilitary manner of running through the streets, "as unjust as it is unfounded." Let us look at the facts in this case, and see whether this charge is as *unjust* as it is *unfounded*, and whether the injustice is not rather in *him*, who makes the unfounded imputation of it to another.

The Complainant is accused of having made a charge against the Respondent of running through the streets, with the company under his command in a *disorderly* and *unmilitary* manner, with a view to intercept the governor and other members of the civil government who were with him. The question is *not here* to be considered, whether the charge is proved ; but, the Respondent's supposition will be taken, *for the sake of the argument*, that the proof was, that the company ran in double quick time, at a rate which may be fairly estimated by the fact, "that only two men lagged behind on the slippery ground." Now does it follow, because the charge is proved no further than this that the charge itself is improper. There would be an end to all the proceedings in courts martial and in all courts of criminal jurisdiction, if, when the prosecutor or attorney general did not convict, or his proof did not support his indictment, he laid himself open to the charge of ignorance in drawing his count, and injustice in prosecuting it. There is, however, something more intended in the use of this language here than meets the ear. The Respondent's position is so closely invested that he must make a sortie to divert the attention of the Complainant *from the Respondent's to his own condition*, and this very attempt will lead to a more accurate scrutiny of the evidence in support of this specification than the Respondent perhaps would wish ; and by its examination, the Complainant hopes to prevent the attention of the court from being diverted from a proceeding, which no evidence in the case can warrant, in the circumstances in which the company was placed. They were not "going on to the field of battle to take advantage of the ground ;" nor "were they suddenly taken in a hail storm ;" nor "were they going late on to a parade." The parade was over ; and, if the object was to get ahead of the governor, and to make him receive the escort, *nolens volens*, as was attempted, this civility might have been offered in one place as well as another. There was not, therefore, that *necessity* existing, for a company whose dress and movements had attracted a *crowd* around them, with *bayonets fixed, running in column, through a narrow street filled with snow*, as General McNiel supposed would warrant such a movement. That officer would not un-

dertake to give an opinion whether or not a flank movement, which nothing but great extremity can justify a commander in varying from, would not have been most proper, without knowing all the circumstances both of place and occasion ; but this he did say, "that double quick time is *not often practised*, and only in *cases of necessity and emergency by well disciplined troops* ;" and that, "though the flank movement was most safe in double quick time, yet, if the distance were very short, and the emergency great, he *might march in open column*, rather than lose time by changing the order of his men." The object which justifies the movement is *safety*, and the *saving of time*, the general says. I do not ask which was *safest*, that is apparent ; but I do ask what order is quicker executed when a company is in column of sections, than for the sections to right face and file to the left. Not a moment would be lost in executing this order, certainly not half the time it took to halt the company, and wait for those who lagged behind, half way down the lane, to come up. The whole testimony of General McNiel goes to show that the mode of marching a company in *column*, or by a *flank* with bayonets fixed, is a matter of discretion with the commander of it ; and the question here is, whether or not that power, in this instance, was discreetly exercised. When asked, "if he would march a column through a lane twenty feet wide and forty rods long, through a populous city, when there was a deep snow, and the path was slippery, and a crowd of people were about, at double quick time, with arms trailed and bayonets fixed, on parade duty ; or, whether he would march by files," the general replied, "if, in marching by column, it would subject the citizens to great inconvenience or danger ; and if, by making a file movement, the desired object could be accomplished as *easy* or with *less injury to the multitude*, I should in that case *make a file movement*."

Now let me inquire of the court, if the condition of things, in Bromfield's Lane, by all the testimony, was not such as to *require a file movement*. The street was narrow ; the snow path narrower, and so slippery that one of the members fell, (who luckily happened to be in the rear rank of the last section,) and the people thick ; if this was not a condition which required a flank movement, and unfixing of bayonets, before a rapid movement should be effected, then I do not understand the witness's distinction.

Dr Hayward says the company "*ran up the street at the tap of the drum* ; the street was narrow and crowded with people ; they marched to the best of my recollection *to Bromfield's*

Lane in *double quick time*, and then *increased* to a *run*," and in answer to a question from the Respondent, the witness says, "that the distinction in his mind between double quick time and running is, that one can be marked by music, and the other cannot." Now what is clearer than this, that though the drum tapped, yet the company ran so fast that its movements were not marked by the music. Mr Spear, Respondent's witness, says, "the company ran faster up the street than any militia he ever saw, and he found it difficult to keep up with or overtake them" — "that two of the Cadets were so far behind the main body, that when the company was at the head of the street, those two were opposite the Indian Queen, which is half way up; that there was a great crowd of people about the Cadets as they went through Bromfield's Lane, but the company left them all in the rear," that is, *they out-ran the multitude*.

Now the place and circumstances are all described, I have no need to ask General McNiel to apply his principle to the case. The court will do that, and be governed by the rule in the book for passing a narrow defile; and, if in any case they should vary from it, by allowing an advance in column, they certainly would not permit it, when the company was running with fixed bayonets and the defile was crowded with people. Light Infantry, practised in rapid movements, would not run a race with the boys through such a street *without unfixing bayonets*, whether they moved by a flank or in column. But that infantry, for which there is no such order in the book as double quick time, should attempt, in the most dangerous mode, to move at an *unpractised step*, with but *eleven* privates belonging to the company in the ranks, (the other *fifteen* being volunteers who were coated for the occasion) is totally unjustifiable by any principle in the book or military practice. The court will require no officer from the army, or ghost from the grave to tell them that.

The Complainant does not know but that the Respondent considers him precluded from making these remarks, as he finds himself quoted in Respondent's argument as admitting on the record that double quick time is a "military movement;" but whether by Artillery or Infantry, Light Infantry or Riflemen the movement is proper, and under what condition of things, is quite another question. Certainly the authorities quoted by the Respondent from the book of tactics will not warrant the Complainant in the admission that it is a proper military movement

for *infantry*, except on such an "emergency" as did not here exist. The Complainant does not mean to be understood as saying that the company did not execute the order as well as it was possible for any unpractised infantry, under like circumstances to have done it; but only, that the very fact of its non-execution by *such a company* furnishes the strongest evidence of the impropriety of the order.

After the recital of circumstances which are the distinct subject of other specifications in this complaint, the first direct allegation this contains is, that the Respondent, with the Cadets under his command, ran through the streets in a *disorderly* and *unmilitary manner*, &c. It is impossible for the Complainant, in commenting on this proceeding, to have much if any regard to the course of metaphysical reasoning of the Respondent's argument. He read that paper but once, and thought, as it would take more than thirty pages of negatives to make a positive, he would leave it for further consideration, when the Respondent should favor him with another supplement. The Complainant, therefore, instead of following the Respondent's circuitous lead, will take the direct path to the result which the evidence indicates.

The fact is indisputable, when the message that the sermon was over was received, the Respondent moved so quickly from his retreat, that some of the company did not overtake it until it turned into Congress Street. The company, however, started in Congress Street with the drum and fife, and, according to the drum major's account, "soon marched so fast and it was so slippery that we could not beat, and we kept time with *one stick* in quick time rather crowded; then we beat *regularly* a few rods in Milk Street, and then took the *fife* and *drum*, and then the *tap* not far from Federal Street, *having marched from the Exchange to where I named last with regular music.*" From other evidence, it appears the tap was continued up Milk Street. The band, who were paid by the government for their services on this occasion, and the other musicians all hurrying along to keep up with the tapper. The church and the corner of Washington Street, where numerous by-standers were observing this new scene of operations, were passed in the same manner; and as soon as the head of the column arrived opposite Bromfield's Lane, the faithful *Braman*, always at hand, stepped up, and gave the commander the friendly advice, that, by going through Bromfield's Lane, he would meet the procession at the head of Winter Street. This lucky thought

enabled the company by changing its route and passing through Bromfield Street, "to run faster than the step could be marked by the music," as Doctor Hayward says, to the head of Bumstead Place, when it formed line, to give time to one of the members, who after slipping down ran as fast as he could to overtake the company, and for another who probably being out of breath, lagged still further behind, to come up. But, as General McNiel says, "it is common on a march in the army, for some men to lag behind, for obvious causes, whether on a quick or slow march," and as there was nothing *unmilitary* in it, *especially on Election day*, it is probable the company moved towards Winter Street before Mr Perkins joined; at least as there is no evidence when he did join, and as Doct. Hayward saw one member still lagging behind in Tremont Street, he was probably the person seen by Col. Quincy when the governor turned the corner of Winter Street.

The members who did not overtake the company, when they left the Exchange, until it turned into Congress Street, were probably those who did not find themselves very comfortably situated in a room with a single stove, where, by the evidence, it would seem, at least a *dozen* musicians thawed out their instruments; for, although there were *twenty* in the band, their instruments were not all quite frozen, and two or three *thawed theirs out in the bar*. But how unfortunate, after all the pains evinced, notwithstanding the rapid pace of the company from quick time to well nigh on to double quick, then to double quick, and from double quick to a run, or "that pace which could not be marked by the tap of the drum," the weather should be so extremely cold, that, at the time of the proffered salute in Tremont Street, *the band could not play a single note!* This is a matter of inference from the circumstances which took place, rather than of positive evidence; for it would seem irresistibly to follow, that when the company had wheeled into line with their ranks opened, their officers in front, in *complete parade order*, (Col. Winthrop being a little in the rear of Capt. Sargent on the right, according to the drum major, and the band *faced another way*,) they would have played a "*full march*," if their instruments had not been chilled again.

As one distinct part of a specification can be found, and another rejected, if the evidence does not warrant the finding of the whole, it is necessary to consider the allegations separately. We come next to that part of this specification which alleges, that, after the Respondent with the company under his com-

mand had ran through the streets in the unmilitary manner before stated, with a view to intercept the governor and commander in chief and other members of the executive council and civil government who were with him on their way to the State House, he did actually intercept him and them in their course to the State House in the public highway, and ordered his company to form in front of the commander in chief and other members of the government aforesaid, which the company attempted to do, and thereby impeded *them* and obliged *them* to change *their* course from one part of the street to another, which conduct was disrespectful to the commander in chief and other members of the government who accompanied him.

Before I proceed to a consideration of this part of the case, I must renew the observation I made before, that the general order of 24th December, required the Cadets to do *escort duty to the government* on the Election day and *not to the governor personally*, any further than as he is a member of it, and as such is invested with the powers of commander in chief, by which it becomes his duty to see that proper respect is paid by the militia under his command, to those on whom the people have conferred the authority of rulers. The court are also requested to observe, that this branch of the specification like the rest of it and all the others, charges the Respondent not with disrespect to his *excellency personally*, nor *with intercepting his individual path* and obliging *him* to turn aside from it, which the slightest motive in the ordinary concerns in the life of any man induces, but which the defence ad captandum imputes to the governor, as though he had taken umbrage at an offence to his own dignity; but that the allegation is, that the company under the Respondent's command and orders "did intercept *him* and the other *members of the civil government who were with him, and impeded them and obliged them to change their course, &c.*"

In the day when the venerable ancestor of the Respondent occupied the chair of state, it was the custom for the governor on the Sabbath to be attended to and from the church by *four halbadiers*; and the historian says, that, "on the accession of the new governor *his halbadiers left him and went home*, of which the governor complained, and rather than be left to go alone, appointed two of his own servants." The present complaint is that the halbadiers left the *government* when called to attend it, not the *governor*, whose pride was not so sensibly affected as was that of the Respondent's puritan ancestor, as

we may infer from the fact that he returned home entirely *unattended*. The court are therefore respectfully requested to apply the evidence to the case under the distinction named which both the republican demeanor of the governor as an act of justice to himself requires, and which the respect due to the civil government of the people, represented in the procession at this time by the governor and several members of the executive council, and the Secretary, the President of the Senate, the Speaker of the House, the Mayor of the city, and a few others in authority in one branch of the government or another, demands, by all the rules of public courtesy, and all the principles of military subordination. And holding this distinction in their mind, that the governor is but one, who it is alleged the company impeded and obliged to change their course, the court will excuse the Complainant for saying, that, as he has not alleged the disrespect as *personal* to the individual, but to the *authority of the commonwealth*, he does not choose to be drawn aside from his charge, to the *personal* considerations which as the defence is calculated to impress upon the court, form the gist of the specification.

The question for the court to consider, then, is, whether the *civil government* were impeded in their progress to the State House in the usual course of proceeding thither; and whether that was caused by the attempt of the Cadets to form in the beaten path in the middle of the road in which the procession was moving. It is so plain a case, that it is hardly necessary to examine the evidence, *before the court that heard it*. The secretary says, "that the public processions of the government usually move in the middle of the road, and that he never went upon the side-walk in such a procession; that he walked with the Hon. Mr Locke, one of its members, in the rear of the council, and, as the procession approached the head of Winter Street, he saw the Cadets in Tremont Street, as he thought, in the act of wheeling between Winter Street and Park Street church, the head of the company being about Winter Street; that the governor, as soon as he reached the *head of the company, turned to the right*; and that, immediately after the governor turned to the right, the pressure of the crowd became so great, as to throw that part of the procession where he was into some confusion. "I proceeded to follow the governor, but finding I should have to *force my way through the crowd*, I stopped and let the multitude pass on." He further says, that "after he saw the governor turn to the right he did not see him again, but

made his way leisurely up to the State House, *entirely disconnected from the procession.*" Here then is the clear testimony of the secretary of the commonwealth that the Cadets formed in the middle of the road, and thus obliged the governor to turn out of it, or halt, and that the *secretary himself* was so impeded by the crowd, that he stopped until the multitude passed by, and that the part of the procession he was in was thrown into some confusion.

The President of the Senate states the same facts, very nearly, as they appeared to him; "that the procession was going up Winter Street in the carriage path-way, and that the Cadets appeared to be in line, with the right facing Winter Street, and that the governor and those who preceded him, (the witness,) *passed off on to the side-walk*; that he soon saw the governor *attempting* to cross the street near where the flag-stones were; but that he and another with him, did not *attempt to follow the governor*, but tried to cross diagonally, and were checked, *apparently by some movement of the company.* He then perceived that the governor had passed the street, and that, in consequence of a manœuvre of the company, *he was separated from the governor and the procession* and did not reach it again; that the gentleman who was with him, he lost in the middle of the crowd; that he got, at last, on to the side-walk of Park Street, and then turned down Beacon Street to his home." Mr Thorndike also testifies, that there was a good deal of noise and *quite a crowd*, which set up a *loud shout*, &c; that the procession seemed to be broken up when he attempted to pass diagonally to Park Street corner; and, on cross examination, he said, that he noticed an evolution of the company, which appeared to be the result of an order, giving direction to the company towards the *path* of the governor, &c.

Here the testimony of Mr Bangs, "that the procession was turned out of the path in the middle of the street, and that it was broken up, is confirmed; and the fact fully proved, upon incontestable evidence, that the governor went one way, and the witness another; that the governor *attempted* to pass at one place, and he at a different one; that he saw an *attempt* to form the company in *front* of the governor; *that the witness, was checked by a movement of the company, himself*; that the gentleman who was with him *was lost in the crowd*, and that he at last got through the *shouting multitude* on to Park Street side-walk and went *home*, instead of *returning to the State House.*

The Hon. Mr Fiske, of the council, who, the Respondent says,

comes in "to give a finishing touch to the picture," has painted the scene with the graphic accuracy of a good artist. He represents the procession somewhat interrupted after his leaving Winter Street, and the ranks so much broken, that, for some time, he lost sight of the governor and the sheriff, the governor having turned out of the middle of the street, by reason of some interruption at the head of it, which he believed to be a snow bank, on to the side-walk at the corner. The company at that time occupied the beaten path-way, the snow bank in the rear obliging him to go on the side-walk in its front, which it seems it was his desire to avoid. The witness proceeds; "as the council, had not adjourned he felt it to be an imperative duty to keep up with the governor." While he was in the *crowd*, perceiving that the governor had passed the company and the crowd, and was walking on the side-walk, the witness broke away, in haste, from the Hon. Mr Locke, another member of the council, with whom he was walking, to overtake the governor, and while passing through the crowd, heard a *general shouting*. The witness says the *company*, the *crowd* and the *procession* were in a *confused state*, and that the company and the crowd passed between the governor and that part of the procession where he was. That there was great confusion, and the company in a *scattered condition*, as it appeared to him; but if they were in a *military condition*, it was so indistinct in the crowd, it was impossible to tell what it was. After I passed the crowd, the witness adds, the first person that joined me was the President of the Senate; when he left me, the secretary came up; we proceeded to the council chamber, but nearly all the members of the council *had got lost*, there being not more than *three* that arrived.

Thus we have the testimony of three of the principal officers of the government who were in the procession, who all agree that the Cadets formed in Tremont Street in the carriage path-way upon which the procession was moving; that the governor and the procession was turned out of its course on to the side-walk; that, owing to the company being in a scattered condition and the crowd mixed up with it, the procession was broken up, and that the company and the crowd passed between the governor, and that part of it where the last witness was.

The other persons whom the Complainant called on to testify, were the public functionaries who were present at the time. But the Speaker of the House went home on the adjournment of the legislature, and the mayor of the city was so engaged at

the health island when he was sent for, that he did not attend to testify.

The Respondent says the adjutant general called himself (though this was an act of the judge advocate,) and Col. Quincy was called by the Complainant to the point under consideration. The former testified to the turning of the procession from its path, which the company occupied, and the latter to the general scene of confusion which the movements of the company presented, and to the actual interception of the governor, by its members, as he passed across the street. That Col. Quincy's meeting with Tilden first and Austin afterwards in the path the governor crossed, on his way to overtake him, was the probable cause of his supposing that the members of the company were in the governor's path, and actually intercepted him, is not unlikely, as the Respondent supposes; for meeting them singly, on their return for an object which the witness was unacquainted with, he could not well otherwise have accounted for seeing them scattering along. But whether the governor was intercepted *there* or not, is of no special consequence. It is incontestable, from the concurrent testimony of all the public functionaries whom the government have called to support the prosecution, that, at the time the Cadets formed in front of the procession, it was turned from its path by the action of the company or the crowd, (by which is immaterial if the company caused it,) and the several members of it intercepted in their progress. The governor, who was seen by Mr Thorndike *attempting* to get through the crowd, was afterwards observed by him as having actually passed it before any other of its members; but the fragments of a ship on the breakers could not have been more effectually scattered, than the members of the whole procession were, by the interception of the company and the crowd which it had collected. The leading facts the witnesses testify to, of the situation of the Cadets, in the middle of the street, and the consequent dispersion of the members of the procession are not contradicted by the Respondent's own witnesses, so that it would be a useless consumption of time to repeat the evidence. The court are referred to the record for the facts, and by the record they are fully established.

The fact of the interception of the procession being incontestable, the Complainant, if it were necessary, would call the attention of the court to the *unmilitary manner* in which this proceeding was conducted. It shall be done shortly, as the court fully understand the description given of the company movements and

need no comments upon them. The music and first section, standing at right angles, were accurately described by the drum major and Mr Murdock. But the second section, there was no witness called to answer for, other than Thompson, the clerk. Him the Complainant was obliged to call upon to prove one point, that of notice to the company, and thereby gave the Respondent the advantage of putting leading questions to him, which are good prompters to the memory of a willing witness; but, even under these advantages, he could not tell by what command it was, that the company were brought into line. He *thinks* he heard an *order*; but whether it was given by the *colonel* or *adjutant*, he *cannot say*; he saw the members getting into line and he formed in too. He *knows* he presented arms, but cannot tell *where he stood*. He knows the company were in military order, after they presented arms, *until* they were dismissed, and does not mean to say *positively* they were not *before*. He is the only witness called to account for the movements of the second section. I will follow him no further, as it is probable, that a witness who says "if the company were in line, they were in parade order," would not be able to give a very accurate idea of any of its military movements, if such there were. But Mr Thompson is as good a witness to *confusion* as any one who has been called, and his disgraceful record of the company proceedings on the 4th of January last, (for the facts stated in which he pretends to have no authority,) and which *is produced in court by the Respondent, who it is said never saw it*, is evidence, that he is equally as good a witness to the *fact of opinion*, from which he says his record is made up, as he is to the *fact of confusion*, which pervades his whole testimony.

Mr Thatcher accounts pretty well for the third company; and Mr Adams for the *fourth*, as well as he can. We have had also the adjutant and the drum major, and the *faithful Braman's* account of the military operations of that scene. Braman, who the Respondent says is an "independent witness" (that is, as independent as any one would be, who was in the pay of the company,) is to be relied upon, because he chose his own position. True. If he had known that an arrest was to be ordered, and his testimony would be wanted, he could not have chosen better positions *for seeing every important thing that occurred through the whole of the day!* But where is Major Barrett to account for the *left wing*, which some of those in the right say they *suppose* was in order. He has been in court, and might have settled a question which the drum major could not answer.

By what manœuvre is it that he was kept away from the stand, when there was so much need of his testimony to settle the question of the order or confusion of the wing he commanded?

Without going into further details, the court well know from the evidence, what the situation of things were; how much of *parade order* the company stood in when they presented arms to *granite range*, before the governor appeared in their front; how well it was manœuvred, and how distinct the commands were, which none of the members of the procession, in different places before it, heard at all; how regular was its salute, and how *rich* the *music* of the *full march*, which was paid to the governor "instead of the *stinted courtesy* which a different state of feeling would have dictated."

The Complainant is now obliged to come to the masked battery of thirteen guns which the Respondent has opened upon Col. Quincy. As much mistaken as he is, in considering that gentleman as the chief witness of the prosecution, yet erroneously thinking that that witness's credibility must be destroyed or himself convicted, the Respondent brought all his guns to bear upon him; but how ill directed his fire was, the court will learn when they find that in trying to blow him up sky-high he over-shot his own mark.

We will take the thirteen contradictions in their order.

The *three* first having been before shown to be futile, at least, the argument here will not be repeated. But in considering these the court is requested to compare the statement of Col. Quincy as to the orders he gave to Capt Sargent, and that of the Respondent in his letter as to the order he received from Capt. Sargent, with Capt. Sargent's own statement on the record, remembering that Col. Quincy's and the Respondent's statements were committed to writing on the very day they were delivered, and by themselves, while Capt. Sargent's was made several days afterwards and by another.

Fourth. The fourth contradiction is "that Col. Quincy stated when he delivered the order, the company had evidently taken up the line of march and were proceeding down the street, and that they proceeded in his sight more than the company's length; yet it is in proof that the company moved altogether only *about its own length and halted.*"

The testimony of Capt. Sargent having before been commented on, the following extract from it is all that is important relating to the distance marched. "He says he reported to Col. Winthrop the order at the first halt, which was opposite to or a

few feet beyond a narrow passage-way at the east end of the church and nearly opposite Brigham's house." The passage-way referred to can be no other than the court, eastward of the houses of Mr Wisner and Doct. Homans, as there is nothing nearer the church that could be called a passage-way, except the entrances to private yards closed with gates. That the company moved twice if not three times its length can be put beyond dispute. After countermarching, it was moving from the church door in column down the street, Col. Winthrop at its head, in front of the band. Col. Quincy passed through, between the first company and the music, and walked by Capt. Sargent's side while he delivered the order, the company all the time moving ; but Capt. Sargent, not comprehending the order, requested its repetition, which was done. Additional remarks, as both the witnesses testify, were made. Then Col. Quincy stepped aside and waited on his ground until the company passed him. Capt. Sargent, after Col. Quincy left him, advanced to Col. Winthrop and commenced delivering him the order before he halted the company. Now the Complainant thinks the very circumstances of the case contradict the supposition that the company moved only its *length* before it was halted. All this conversation could not have passed between Col. Quincy and Capt. Sargent, and been carried by the latter to Col. Winthrop at the head of his company, still on the march, without the company's moving *more than its length*.

Fifthly. "He states that he saw at the meeting-house a printed order of exercises, as is usual on such occasions, and he thinks he saw the words of a very short anthem printed on it to follow the sermon." The State printers testify "that there were no printed orders of exercises that day, and that it is not usual on the days of General Election to have any."

Col. Quincy upon this point makes no *positive* statement, he is asked by the Respondent "whether there was not a published order of exercises that day." *Answer*. "I believe there was." When inquired of as to what exercises were there announced, he replies, "*I cannot state positively*, but my *impression* is, that there were the words of a short anthem ; but, whether performed or not, I cannot say."

"To the 6th question 'whether the company reported according to order, after half an hour,' he answers 'that they did not, to his knowledge, then or at any other time : ' yet he himself states that he heard the drums of the company returning to the meeting-house, and it is in proof that no other mode of report-

ing during divine service was ever known on such an occasion." The court are requested to observe that the avowed object of this argument is to prove such a contradiction in the testimony of Col. Quincy as to invalidate the rest of his assertions, and the Complainant would respectfully inquire whether this ought not to be attributed to Col. Quincy's ignorance of the system of tactics, that considers *drumming by a church*, as a military mode of making a report for duty, rather than to any intention of misunderstanding their novel mode of communication; and although it is stated that there is no other mode of reporting during divine service ever known, the Complainant would inquire, *when and where this particular one was ever before adopted.*"

Seventh contradiction. "He has no recollection of seeing Sergeant Murdock in the meeting-house. It is in proof, nevertheless, beyond question, that Sergeant Murdock was in the meeting-house in a visible and conspicuous situation, and Sergeant Murdock *testifies that he thought* Col. Quincy saw him, because he caught his eye several times." Sergeant Murdock *does not testify that he thought Col Quincy saw him*, his words are, "I am not certain that he knew of my presence." "I caught his eye several times. I *sat* on the inside near the door, Col. Quincy was on the opposite side; I made no signal, not thinking it necessary."

This contradiction, to make the most of it, is this, that Col. Quincy said he did not see what Sergeant Murdock *thought* he did. The Complainant requests that the *certainty* of Col. Quincy may be put against the *imagination*s of Mr Murdock, especially as he made no signal.

Eighth contradiction. "The witness testifies that after the conclusion of the services he made inquiries at the door, of the constables and other bystanders, about the company, but could get no information either as to where they were, or when they would be likely to return; yet Robinson the constable states that when Col. Quincy made his appearance in the porch and inquired for the company, he himself told him that he had despatched a messenger for them, and that in all probability they would be there in a few minutes, that they were then either at the Exchange or on the march."

To this extract the Complainant only wishes to add one answer from Mr Robinson's testimony. "Are you sure Col. Quincy heard what you said?" He answers; "*I am not*—he *made no reply.*" Where is the contradiction? Col. Quincy

says he did not hear any such communication. Mr Robinson states that he is not sure that he did.

Ninth contradiction. "He is very certain that Sheriff Sumner was the man who brought to him while at the door, a message from the governor directing his return, he is confident he received but one such communication, and that from the sheriff; yet Mr Constable Reed swears that he was the man who carried the message to Col. Quincy from the governor, and the Prosecutor does not call Sheriff Sumner to contradict it, as he might if it were not true."

Why does not the *Respondent* call Sheriff Sumner? It is not Complainant's business to call a witness to contradict his own evidence; and to contradict *Reed*, whose half page of testimony is sufficient, of itself, to show that no such contradiction was required, would have been useless. Reed says "he stood in the broad aisle near the governor. After the services were over, there was a *space of three or four minutes — then Col. Quincy goes to the door.*" I will go no further; circumstances will not lie. That it was three or four minutes after the services were over before Col. Quincy went to the door is incredible. What should he remain in church for during that time? No one will believe that he did not *immediately* go to the door with the usual message for the company to prepare to take up the escort, let Mr Reed's testimony read as it will. The Complainant was so strongly impressed at the time Reed testified, that the Respondent's advisers saw he could not stand alone when they cross examined him themselves, to get him to contradict himself, that he omitted all further notice of his testimony. The court will give it what credit it deserves to put down Col. Quincy.

Tenth contradiction. "Col. Quincy thinks the procession was detained ten or fifteen minutes waiting for the Cadets after the services were over, and that he himself waited ten minutes in the porch; yet, it is a matter of *demonstration*, that not more than two or three minutes could have elapsed from the conclusion of the services to the governor's leaving the church."

Col. Quincy makes no such statement as that "he waited or *thought he waited* ten minutes in the porch," nor any *positive statement* on the subject whatever. His words are "*I can't tell exactly, but I should think ten or fifteen minutes, it might not have been more than ten minutes; I could not judge very correctly of the lapse of time while I stood in front of the Old South; I remained there, as I before stated, until I received the message of the governor, requiring my return.*"

On cross examination, in reply to a question, he says, "*I think ten minutes elapsed between the time when I first went to the door and that when his excellency left the church.*" As to the matter of "demonstration," the court are requested to examine the statements of Mr Thorndike and Mr Fiske and see if Col. Quincy is convicted of mistaking the time *to a demonstration.*

Eleventh contradiction. "Col. Quincy *insists* that the order for arrest, &c, was served as late as 7 o'clock in the evening, &c."

Col. Quincy does not *insist* that the order was served as late as 7 o'clock. His words are "He served the order at *about half past six or seven o'clock.*"

The Complainant need not comment on the situation of Garfield, as the servant of the Respondent, and to the indefiniteness of his reason for *fixing the time*, and the want of certainty as to the identity of the packet containing the order. But that there was a lamp in the parlor appears from his testimony, and the adjutant general testified that it was an hour, or an hour and a half after candle-light, when Col. Quincy took the order of arrest from his office.

Twelfth contradiction. "He states that he knows in Col. Baker's case they had not left the church until after the hour for which the company had been dismissed was elapsed; that the governor then walked up to the council chamber, and that after he had been there some minutes the company appeared; yet Col. Baker states positively that when he reported at the State House he was within an hour of his own time, and only five minutes after, by Col. Quincy's."

The Complainant need but make a single remark on this evidence. The fact has no bearing on the case. Col. Baker could have been examined on this point for no other reason than to contradict Col. Quincy. It was a matter of notoriety at the time that a difference in watches caused a difference of opinion between those gentlemen; but one which would not in the slightest degree affect the credibility of either.

The thirteenth and last contradiction is, that "He states at one moment that there *was* deep snow in Tremont Street, except on the side-walk; and the next moment he states, that the whole centre of the street was beaten down to nearly a uniform hardness with the crossing path; *on which point he is contradicted by several credible witnesses, besides himself.*"

It might be sufficient to state that there is no contradiction

here according to the Respondent's own showing, unless he can convince the court that deep snow cannot be beaten down. But there is no need of resorting to argument in this case ; Col. Quincy makes no such statement as the Respondent asserts ; the following is his language :

“ *Question.* Was there not a deep snow in Tremont Street except on the side-walk ?

“ *Answer.* I do not *remember particularly*, I *believe* there was ; the side-walk had been cleared.

“ *Question.* Did his excellency step out of the path into the snow-bank, or not ?

“ *Answer.* According to the best of my recollection, there was nothing at that part of Tremont Street which would deserve the appellation of a snow-bank, the highway at that part of the city is generally beaten throughout. I *cannot state precisely*.

“ *Question.* Was there or not a beaten path crossing the street from granite range to Park Street church, or was there not more snow, on each side of it, than on the path ?

“ *Answer.* There was a beaten path, but *according to the best of my recollection* the whole of the centre of the street near which the company was forming was beaten down to nearly a uniform hardness with the path.”

There is however one point further which speaks volumes for the veracity of this witness, and that is, with all these contradictions he has not *contradicted himself*. His examination lasted two days, he was sifted by most able and experienced advocates, every question that ingenuity could suggest was asked him, and yet, when they would wind up their contradictions in the strongest manner, they state but one instance in which he has contradicted himself, and that is based upon an evident mistatement of his testimony.

The Respondent allows that that gentleman is worthy of all credit in other cases ; the event will decide whether he is not so entitled in this.

The imagination which could discover a flying Dutchman in the clouds, is perfect sobriety, compared with that which could conjure up *thirteen* contradictions upon such testimony.

The Complainant has taken some pains to show the weakness of the attack upon the reputation of as fair a character as this community boasts ; not because he thought it necessary to do so before this court who heard him testify, or for any of the purposes for which it is called ; but, because there is no man in

society so rich in reputation that he can permit it to be trifled with. Rumors may injure, and slander tarnish it, but an *unanswered record*, even of unwarrantable assertions, might *hereafter* have been made the ground work of malice for its destruction.

To the delivering of the commander in chief's orders and several other parts of the occurrences of the day, Col. Quincy from his situation, was, in truth, *the chief, and only witness*; but not to the transactions in Tremont Street, during which, that gentleman was occupied in receiving and delivering the orders of the commander in chief. Of those concerns, other gentlemen, who were in the procession and who had nothing to do but to take care of themselves, had more distinct and important recollections, so that the fire of the Respondent's artillery was not only unsuccessful, but was misdirected.

The Complainant had contented himself with the remarks he had before made of Capt. Sargent's want of recollection of *material* circumstances, without meaning to say anything more. But in the Respondent's supplement to his argument, since received, as Capt. Sargent is mainly relied on to impeach the testimony of Col. Quincy, the duty of the Complainant requires him to follow the Respondent's lead, and see if *his principal witness* has not laid himself *more* open to this kind of attack, than he who was first assailed. This is a necessary resort upon that kind of courtesy which the Respondent has exhibited, and, is merely meant as such, to show how careful a witness ought to be in the relation of what he considers immaterial circumstances, as well as of those which he thinks important to the issue.

1st. Capt. Sargent contradicts himself in this particular. He said the company was ordered at the meeting-house to report themselves "in more than half an hour, or half an hour or more," which he afterwards swears is wrong.

2d. He contradicts himself again, for he first swears the words were, "that the company should report themselves," and afterwards "you will report yourself."

3d. He is contradicted by Col. Quincy with regard to the terms of the order, and with regard to the suggestion said by him to be made at the end of it.

4th. He is expressly contradicted by Braman, who swears, that he delivered the order to Col. Winthrop at the Exchange, and returned without any delay. But Capt. Sargent says he was on the side-walk in the street when he heard Braman deliver the order.

5th. He is contradicted by most of the members of the band who testified on the subject, for he says, they did not leave the basement room of the Exchange, and they say, they did.

6th. He is contradicted by Austin, for he says, that Austin left the governor before he got upon the side-walk in Park Street ; but Austin swears he did not.

7th. He is contradicted in the same way, and with relation to the same fact by Tilden.

8th. He differs from every other witness in his computation of time, and if his estimates are correct, the services of the church could not much have exceeded an hour in the whole.

9th. He is contradicted by Lepean, who says the funeral in Milk Street was drawn up towards Federal Street ; but Sargent says it was drawn up towards Washington Street.

10th. Lepean says the rear of the funeral extended nearly to the Mansion House ; but Sargent says it extended nearly to Washington Street.

11th. He is clearly contradicted by all the facts as to the distance the company had moved from the door of the church in Milk Street before the first halt.

12th. Capt. Sargent says that the adjutant general and Col. Quincy continued with the governor from the side-walk of granite range to the State House, when Tilden says the adjutant general fell in the rear of the governor at the corner of Tremont Street, and it is proved on all hands that Col. Quincy left him to deliver a message to Col. Winthrop.

13th. He is most conclusively contradicted by Col. Winthrop himself, for he says without qualification, that he was ordered, through Capt. Sargent, to report in half an hour ; but Sargent hardly knows what he did say, carefully qualifying the words he used in the one alternative or the other.

The court are now requested to decide which of these opposing batteries of an equal number of guns, throws the greatest weight of metal.

As the Respondent will not have the opportunity which is afforded to the Complainant in relation to his witness, of answering these contradictions, in *fairness*, he *says*, they are not introduced to exhibit the *utter incredibility* of Capt. Sargent, as was the *Respondent's object with Col. Quincy* ; but merely, to show how easy it is, by contrasting the immaterial as well as material parts of a long record, to make any witness, however fair his intentions, *appear* to be utterly unworthy of the place he occupies upon it.

Upon the evidence the record furnishes of the transactions to which this specification refers and weighing the testimony of the witnesses by the common rules, and considering the relation in which they stand to the persons interested in the inquiry, the court will decide upon this specification; and the Complainant hopes they will consider it as something more than "*a libel under the color of law.*"

3d specification, 3d charge. This specification after a recapitulation of the occurrences particularly referred to in those preceding it, states the delivery of his excellency's order to the Respondent in Tremont Street, *dismissing him from duty*, and then says, that the Respondent, after receiving the order last aforesaid, and after the commander in chief and other members of the government who accompanied him, as aforesaid, had passed by the said company under the said Lieut. Col. Winthrop's command, marched his said company up Park Street, closely following in rear of the commander in chief, to the State House, and there formed his company in line, in the same way and manner as he should have done, if he had not been dismissed from duty; and then, without making any explanation, or offering any apology for his disrespect and neglect as aforesaid, or even asking permission so to do, but on the contrary, in contempt of the order of his excellency, last given as aforesaid, sent his adjutant up to his excellency in the council chamber, to report for further orders; all which conduct on the part of the said Lieut. Col. Grenville T. Winthrop, was highly unmilitary and disrespectful, and subversive of good order and discipline.

The mark of *intentional disrespect* which this specification exhibits cannot be concealed by the defence, which is aimed, not at the merits of the charge, but at the incidental matter the specification contains. The act itself is a *palpable disobedience of the order* he had just received. It was not only *unmilitary* and *unofficerlike*, but it was *passionate*. The Respondent gave himself no time for that reflection which the case so much required; but, in direct violation of a *positive order, dismissing him from service*, he follows the governor directly up the street, forms his company in line, in front of the State House, himself remaining at its head, and sends up his adjutant to the council chamber, *and claims his excellency's further recognition*. He virtually says to him, I do not choose to be treated with an unceremonious dismissal in the street; but I will have the order from the council chamber as usual, or I will disregard it. If

this is not an act of *intentional disrespect*, if this is not *contempt of military authority*, if this is not *subversive of good order and discipline*, it is because the principles of military subordination are not known among us. I will put the case to the court itself, and let each member of it decide, if, instead of arresting the commander of a company on the spot, he had *ordered it out of the line* on a parade day, by reason of its disobedience of his orders in the duties assigned it, and its commander, instead of obediently retiring, had marched directly up to his marquee, and without explanation or apology, demanded his further recognition of him as an *officer in the field*, whether you would look upon this act as one of *diffidence* and *doubt*, or of *disrespect* and *contempt*. You *knew* he understood his duty, and the force of the reproof he had received in presence of the line for its negligent performance. You saw him approach your quarters. You *knew* him to be an *officer* and a *gentleman*, and what would be the expectations the approach of *such a one*, under *such circumstances*, would create? That he came to *intrude* himself on your notice, or to take a conspicuous place in the field, in defiance of your commands? No. This would be but an act of sullen insubordination, not to be expected from an officer and a gentleman. *Such an officer*, in the consciousness of his innocence, would ask permission to say that he entirely disclaimed, in what he had done, any *intentional disrespect*, and hoped, that what might be considered as inexcusable negligence, would be received as arising from the want of that information which he had taken what he deemed sufficient pains to secure, and which, when opportunity should be offered him, he would fully explain. If an officer thus conducting, should ask to be restored to his place in the line, for his company's sake, if not for his own, would you not most cheerfully grant it? Certainly. But if, *without such an explanation*, when he *demand[ed] your further orders*, you treated him with the same respect as before, and restored him to his place, how long should you expect your commands to be obeyed?

But now we have on the records another plea of *not guilty "upon the word and honor of a gentleman,"* for the declaration thus made, that the Respondent did not understand the order, not being in evidence, must be rejected as proof, and can be considered in no other light than as a renewal of his plea to the charge, with this difference only, which the Respondent makes, that the first was a plea as an *officer*, and the last was upon the *word and honor of a gentleman*. He does not deny,

in this, that he received an order; his denial is, that *he did not sufficiently well understand it, to act upon it*. This is a measured phraseology, interlined in the manuscript, and just fitted to bring the admission within a rule of action which General McNeil laid down, as a proper one for such a case. But being favored with this gratuitous declaration, I cannot help remarking upon it, that, if no *disrespect was intended*, Col Quincy was the officer of whom the Respondent should have asked the *explanation* of the order he delivered, *not the governor*. But the report of Capt. Sargent in the council chamber was not for the *explanation* of the order, *now* acknowledged to have been received; but to inquire, "if there were any *further orders*." Thus the Respondent's declaration has furnished that evidence which was before wanting of his full comprehension of the first order, by his report for *further orders*, the object and character of which inquiry under these circumstances must be left, to the decision of the court.

The gasconade about the allegation of "*not asking permission to make an apology*" is founded on an entire perversion of plain languages. The charge is that the Respondent *made no explanation*, nor *offered any apology for his disrespect and neglect of duty*. And in what new code of honor has it been promulgated that it is unbecoming one *gentleman to ask leave* to make an explanation for an act of palpable disrespect committed against another gentleman? In what rules and regulations has it been declared unbecoming a subordinate officer when dismissed from duty to ask permission for an opportunity to explain to his superior the circumstances, if such there were, that led to *evident and manifest* disobedience of orders and neglect of duty? Was *Col. Williams* afflicted with that *juvenile spirit* of independence, which can do a wrong act without compunction, but haughtily disdains to adopt the means sanctioned among gentlemen to do a right one? The first exclamation of Col. Williams was, "*I assure your excellency upon my honor it is an accident; I beg, I beg, in God's name, you would not consider it as a personal affront*;" and, was even proceeding to further protestations, when the high and honorable feeling which he has manifested excited a kindred feeling in the breast of Governor Gerry, and his escort was immediately accepted. Were the feelings of the Respondent such as those which actuated *Col. Baker*, when being only constructively in fault, he went so far as to tender his commission, that the atonement should be as extensive as the most perverse construction of his conduct

could demand? The Respondent seems to have been advised that an apology is a mere conventional matter, a device by which a pseudo gentleman can maintain the standing of a real one. Whereas among gentlemen (I suggest it with deference to this new authority,) an apology has more healing power for the man who makes it, than for him to whom it is made.

In connexion with this topic, another intimation of the Respondent may be noticed. Insinuating inquiries are made as to the manner in which a rumor of the Respondent's having written an insulting letter to his excellency, first gained possession of the public ear. The Complainant, denying his accountability for every rumor that may be circulated, and averring that he was never instrumental in originating or propagating that rumor, asks, if it be a very improbable supposition, that the same spirit which now claims to be its own judge, whether an apology be or be not due, for an act of military insubordination—the same spirit which braves the authority of this court to inflict any sentence about which the Respondent would care a hundredth part so much as he should about his *right* to withhold an apology where one was obviously due, might not also have suggested, soon after the evening of the 4th of January last, in the precise language of the present defence, “that his excellency had probably received such a *rebuke* as would teach him the difficulty of ordering courts martial for the trial of his subordinate officers.”

The Respondent's advisers contrast with a degree of harshness, which nothing but the sincerity of their belief in the assertion would warrant, and hardly that, the conduct of Governor Gerry, with that of Governor Lincoln, unfavorably to the latter. If the cases had been similar, their comparison would have been better warranted. But let the Complainant ask in his turn, whether if “Governor *Lincoln* did not act as Governor *Gerry* did,” it was not because Col. Winthrop did not act as Col. Williams did? Col. Williams made a *frank and immediate apology*; and Col. Winthrop, without even offering it, attempted to *force* his *attentions* upon Governor Lincoln, which *he* did not choose to accept in the manner in which they were offered. In saying, that if Col. Winthrop did not *apologise*, as Col. Williams did, it was because there was not the same difference of political feeling between the commander and the governor now which existed then, he exposes himself to the imputation of *ingratitude* and *servility*; *disrespectful ingratitude to a friend, and the meanness of servility to an enemy*. But to make

the contrast fairly, we must look at the conduct of the governor in the parallel case of Col. Baker, whose honorable feeling fully equalled Col. Williams', and see whether *Governor Lincoln* was out done by *Governor Gerry*, even in the quality of politeness, which always characterised the gentlemen of the old school of the Revolution. Governor Gerry, instantly perceiving from the warmth of Col. William's expressions that they came from the heart, met them with an *open and generous feeling*. The same was done by Governor Lincoln when Col. Baker appeared in the council chamber with his officers and made an apology, which was immediately accepted; and, as soon as the officers had resumed their places in the company, the usual order of relief after the services of the day were over was *transmitted by his excellency's aid*, from which the *whole company* perceived their honorable recognition. Nor does the comparison here cease. Col. Williams repaired to the council chamber, after his company was dismissed, and there made such a *further explanation and apology*, as induced the governor, with a view to relieve Col. Williams from the mortification he expressed and felt, to issue a general order, that day, expressing his entire satisfaction with his conduct; and, on his retiring from office, his *thanks to the company* for the many attentions they had shown him.

On the day following Col. Baker's occurrence, that gentleman, with that high mindedness which does not *fear* to *make an apology* lest it should be mistaken for *servility*, sent to his excellency, through the hands of the major general, the resignations of himself and his subordinates in command. And in the letter accompanying them, after referring the governor to the apology which he had yesterday submitted for the *unfortunate* but *inadvertent* neglect of his duty relative to the escort duties of the Cadets, expressed his *fear* that he had not fully exonerated the *corps* from the displeasure of the executive, and his *unwillingness* that any *neglect* on the part of the *officers*, should deprive the *Cadets* of their accustomed privileges and honors. Upon the receipt of this communication, the adjutant general, in the governor's own words, replied, that, his excellency saw "*in this act* on their part, evidence of that delicate sense of *military honor* which actuates the conduct of *high minded men*. But as the unfortunate occurrence which has probably induced to the resignations was most promptly and frankly explained, and the apology offered was received with entire satisfaction, the commander in chief cannot consent to

deprive himself of the *personal gratification* to be derived from the future services of those *accomplished officers*; the *corps* of the *benefit* of their *command*, and the militia of that *good example* of *military subordination*, which he doubts not, on this occasion, they will afford in a faithful and cheerful continuance in the discharge of the duties of their respective stations." — Surely, after this, the Respondent need not have feared that a proper apology would have been received by him who had thus acted on a similar occasion with the refined sensibility of a gentleman, "*as an unmeaning servility.*"

The Respondent in the course of his defence has *claimed to himself* some acts of precaution, and others of attention, upon which he has relied to rebut the imputation of negligence and disrespect which the charges imply. That hurried and most undignified movement which he made through Bromfield's Lane, which, most fortunately was unattended by that injury to which the inhabitants were exposed, and which, from its unmilitary character, if it had have resulted, would have exposed him to an action at law, for the damages sustained, is claimed as evincive of the *zeal* of the Respondent to *repair* his previous neglect. But it appears from the evidence, if this act of strategy is entitled to all the encomiums which have been passed upon it, the Respondent was wholly *indebted to the faithful Braman* for its suggestion.

"The unstinted courtesy of a full march" paid to his excellency by the band at the State House was not *suggested by those feelings of respect* which make so important a figure in the Respondent's defence, but was suggested by another.

Mr Murdock was sent to the meeting-house to receive expected orders, which is insisted upon as proof of *extraordinary care and diligence*. Here too, the Respondent shines conspicuously, but by a borrowed light; for, on that occasion, it was the adjutant who exercised the *vigilance* of the commander.

The adoption of a new uniform for the company was to be set down as another evidence of his intention to do the governor signal honor, upon the Respondent's accession to the command of it; but the answer of a witness to the Complainant's inquiry "that the uniform was agreed upon *two months' before that important era*, probably reduced the list of the numerous distinctions with which the governor's ingratitude was to have been contrasted.

But the evidence is complete, that several *uniform coats* were ordered by the Respondent to be made for this special occasion.

Did this appropriation, let the Complainant inquire, arise from the respect the Respondent had for the *constituted*, or *to be constituted authorities of the government* whom he was to have the honor of escorting? or, from a disposition to gratify his own pride. Whether the collegians were decimated, and the tailors put in requisition for the *honor of the state*, or for his *own glory*, I will leave the court to decide, according to the motives which commonly influence human conduct.

After this tedious argument, to which the court have given such faithful attention, the Complainant would think himself undeserving of their further kindness, if he were to take up much of their time in general remarks. Yet these seem to be more necessary now, than if he had followed the course of the Respondent, and made them as he went along under each specification. But the danger of repetition caused the Complainant to reserve for the close such general remarks as would apply to the whole case, and that course now he has much occasion to regret, because he is called upon to appear before the court in answer to a defence which it took five hours to read, without having time to consider a few only of the general observations it contains. But those which are calculated to deter the court from its duty by threatening appeals to public opinion should not pass without observation. In those tribunals where the Respondent's advisers usually appear, such appeals would not be tolerated. Public opinion may be right or wrong, but when such threats as the Respondent has indulged in are made, they are appeals to what *he considers a correct public opinion*; but if *his notions* of it constitutes its only guide, *the court* will not have much occasion to regard it. Public opinion in a republican government is expressed in the legislature, in courts and other public assemblies which the people have established, much more correctly, than in those private places where irresponsible men congregate, and rumors are thrown out by those who *seek persecution*, and charged upon those who have no disposition to become persecutors. The court has heard this cause, I had almost said, *too patiently*; and in coming to a decision I have no fear but that their judgment and sentence will create a more correct opinion, than that which rumor and prejudice have attempted to forestall.

As officers you are called on to decide a question involving the first principles of military subordination and discipline; and upon your judgment, in a case which has excited so much public observation, and which you are known to have heard

with great impartiality and patience, will the question very much depend, whether the institution can be maintained which you are sworn to support. Unless the first principle of all military rule is considered as fixed and immovable by human authority, neither civil nor military power can prevail, but anarchy and misrule will take the place of authority and subordination.

The commander in chief does not come before this court to oppress and bear down by the weight of authority an officer under his command. He is here figuratively, as in the civil courts. But it is to be hoped he would not be deprived of the right to prosecute in a matter of *personal* interest in the one more than in the other; for when he appears it is on the same ground as others, and he only claims that equal justice which he has a right to expect. The governor has no more interest in this question than either of you, or any other member of the community. It is not a case personal to himself. He never felt it so in the least degree. It was the government of the commonwealth, not the governor of the commonwealth which was offended at the proceedings of the escort on Election day. But the governor, being at its head as the chief executive officer of the state, is obliged, as he was in this case, very often to do what he would gladly avoid.

The Complainant, in the Respondent's argument, is stated to have said that the *words of aggravation* in the charges were mere matters of inducement. There is no such suggestion on the record; and, as he has already expressed his opinion concerning their bearing in his introductory remarks, he will pass over this subject now, by saying that he can see no motive in the Respondent for that allegation other than to put a weak argument into the Complainant's mouth to show how easy it can be refuted.

In one of the Respondent's observations it was understood there was an intimation, that this was a fit case for a court of inquiry rather than a court martial. Besides the remark, that where all the facts are known, there is but little need of incurring the expense and trouble of two courts instead of one, I will add, that the suggestion does not arise from a correct knowledge of the statute, which authorizes courts of inquiry in cases only where the complaint is by an inferior against a superior; so that when the governor, in behalf of the government is obliged to become the Complainant, he has no election which tribunal to call in to action, not even in a case which is said to have arisen "*in a trifling error of judgment.*"

It is imputed to the governor, that, having refused the salute in Tremont Street, he was not *entitled to another offer of similar courtesy; nor had he a right to either explanation or apology.* This ground of the Respondent makes it necessary for me to remark, that the proffered salute was one which no officer on any occasion would receive at all, much less as a compliment, according to his own witness, Gen. McNeil, who says, according as he viewed the previous conduct or present design of one offering a salute, so he should deal with him. "If I supposed," said he, "he had any intention of disrespect, or *had strong reason to believe he had been very negligent, I should arrest the officer, and put some other officer in his place.*"

The arrest of the Respondent was on this ground, that from whatever cause the original error had been committed, whether it arose from excusable circumstances or culpable neglect, yet the order having been disobeyed and the commander in chief's displeasure made known, as no explanation or apology was offered, or request made for an opportunity to make one, either orally or in writing, at that, or any *future* time, but a conduct of defiance adopted, implying that enough had been done, and if more was required it was more than would be granted; it was on this ground the governor decided to put the point of duty at issue, to give the Respondent the opportunity of making that explanation of his conduct in public, which was withheld in private.

It has been said that the haste of the arrest precluded this. Those who read the defence will hardly think that time should have been given to do that which the Respondent says was neither required by the rules of courtesy, nor a sense of justice. Instead of an immediate arrest in the public street, which Gen. McNeil would have adopted, a delay of a few hours took place, and when it was found that the order of dismissal from duty was not taken as a rebuke, as it was intended, but was tauntingly disregarded, there were obvious reasons why the arrest should immediately follow the offence.

The commander in chief was placed by the conduct of the Respondent in an unpleasant predicament. Either he must overlook an act of palpable disobedience in one who *justified his conduct*; or he must subject the commonwealth to an expense, which the object, considered of itself and independently of its consequences, would not justify. But, being sworn to the support of the constitution and the laws, and ever faithful to his duty, his excellency threw aside all those private consid-

erations which would have influenced a man of less public devotion, and pursued the path of duty. Suppose he had taken the opposite course, would it not have been said that he was governed by partiality and favor? that there was, in fact, one law for the Cadets, and another law for every one else, as the Respondent's advisers now contend there should be? Would not the prevalence of such a well founded opinion have been so strong, that public authority could not have been maintained against it?

Gentlemen, the Respondent argues, will not take commissions, if they are to be vexed with courts martial, and the militia will go down for the want of patrons. Never, Mr President. Never, so long as those only refuse commissions who disrespect the laws. Such men should never be offered them; and if they accept, should be taught *that they hold them under the law*, and upon those terms of equality with the rest of their fellow citizens which the principles of republicanism inculcate. If one *militia* officer is to be tried, fined and broken, while the commander of a company of *gentlemen* who do not regard the amount of the fines imposed on them for neglect of its duties is to be treated by that very authority with respect which he treats with disrespect; — if those on whom the trouble and expense of a military trial would fall heavy, are only to be subjected to its authority, while those who do not regard its penalties *a hundredth part so much as the right to decide whether to make or withhold an apology*, are not to be vexed with it, then indeed the Respondent's declaration will be verified, that this is the last court martial which will ever be held in this commonwealth.

It is said that the last charge of unmilitary conduct is not brought by his excellency.

This objection is grounded upon the fact that the Respondent was arrested on the two first charges only. But those who make the objection well know that the charge of unmilitary conduct is so intimately connected with the whole proceeding, and the difficulty there would have been of bringing the facts proved under it within the range of either of the other charges. If a prisoner can be tried *only* for the crime for which he is committed, then an officer cannot be held to answer for an offence for which he was not arrested. But the allegation that the charge was not according to the commander in chief's authority cannot be made by those who have read the complaint, for it is there expressly stated to have been so.

The adjutant general is said to have been called on orally to state for what particular purpose the private letter of the Respondent of the 4th January was offered in evidence, that the fact might be admitted and the letter kept from the public eye for which it was not written.

The reason why he declined doing so is now apparent on the face of the whole record ; this shows that no admission, short of every expression the letter itself contained, would answer the purpose of the letter itself which goes to the merits of every charge and every specification. It was said to have been intended as a *private* letter ; but it is now before the court who can judge of the impropriety, if any there was, in producing in evidence a letter *officially* addressed, *officially* signed, and which treated of the subject of a *public proceeding* solely. The letter itself is evidence of that feeling of supremacy over the law which characterizes the defence. The arrest was the first act which taught the Respondent that there was any law for him, or any authority over him. "The injury has been *done me*," says the Respondent, "I have offended no man, why am I assailed and held amenable to a court martial?" "The injury has been *done me*;" but it is not said I will wreak my vengeance on the head of him who has thus inflicted it. The opportunity for doing this has however been furnished and freely indulged. The charges have been called *frivolous* and *vexatious* ; they are *said* to have been as *unfounded* as they are *unjust*, their prosecution has been considered as *oppressive*, and the chief magistrate of the State is charged with having made a *libel against the Respondent, under the color of law*, and of having used his authority to bear down a citizen. In this state of the record, you are called upon by more serious obligations than arise from the situation of the Respondent *alone*, to a careful investigation of the case. By the ground taken in the defence, you are to consider the bearing of your decision upon him by whose authority the Complainant acts, as well as upon the Respondent himself.

In taking care that you do not bring disgrace on the Respondent's character, "or his name," (may it long continue to be *clarum et venerabile nomen*) you must also regard the charges which he has brought against him whose character and name is at least equally deserving of respect and regard. The attempt to bring disgrace upon the governor by charging him with taking offence at the wound inflicted upon his *personal dignity*, because his *vanity* was not gratified by "all the glori-

ous pomp of an escort;" upon the Complainant for his motives and his conduct, both of which are unjustly assailed; — upon the aid of the governor, in the attack upon his credibility, all upon equally light and untenable grounds calls upon you, Mr President, and you all, gentlemen of the court, for that general vigilance and circumspection in your judgment which a case so rare in the history of our tribunals exhibits. Those who heard the Respondent's defence would think they were all to be swept out of court, and I do not know but out of the state. But if you shall be of opinion that the state is large enough for more than the one man to live in who makes this assault you will give such a judgment as will permit those who are assailed to occupy their places in it with reputation and honor.

WM. H. SUMNER.

And the court adjourned to meet this afternoon at half past 3 o'clock.

THURSDAY AFTERNOON, APRIL 12, 1832.

The court met pursuant to adjournment.

Present, Brig. Gen. Wm. Peck, President. — Col. Thomas Davis, Col. Charles Lane, Lieut. Col. Abijah Ellis, Lieut. Col. Luther Eaton.

The Respondent was called and answered.

The Complainant was called and answered.

The court room was cleared.

The court room was opened; and the court adjourned to meet tomorrow morning at 9 o'clock.

FRIDAY MORNING, APRIL 13, 1832.

The court met pursuant to adjournment.

Present, Brig. Gen. Wm. Peck, President. — Col. Thomas Davis, Col. Charles Lane, Lieut. Col. Abijah Ellis, Lieut. Col. Luther Eaton.

The Respondent was called and answered.

The Complainant was called and answered.

The court room was cleared.

The court room was opened, and the Judge Advocate summed up the evidence to the court. And the court adjourned to meet this afternoon at half past 3 o'clock.

FRIDAY AFTERNOON, APRIL 13, 1832.

The court met pursuant to adjournment.

Present, Brig. Gen. Wm. Peck, President. — Col. Thomas Davis, Col. Charles Lane, Lieut. Col. Abijah Ellis, Lieut. Col. Luther Eaton.

The court was opened, and then the room cleared for deliberation. The room was opened and the court adjourned to meet tomorrow morning at 8 o'clock.

SATURDAY MORNING, APRIL 14, 1832.

The court met pursuant to adjournment.

Present, Brig. Gen. Wm. Peck, President. — Col. Thomas Davis, Col. Charles Lane, Lieut. Col. Abijah Ellis, Lieut. Col. Luther Eaton.

The room was cleared for deliberation.

And now the court having heard all the evidence in the case read by the Judge Advocate, and having maturely considered all the charges and specifications of charges do find as follows, to wit :

That the said Grenville Temple Winthrop is *Guilty* of the first specification under the first charge.

That the said Grenville Temple Winthrop is *Guilty* of the second specification under the first charge, with the exception of the following words thereof, to wit : “ nor at any time thereafter ready and prepared to take up the escort of the government aforesaid, until the members thereof had left the meeting-house.”

That the said Grenville Temple Winthrop is *Guilty* of the third specification under the first charge.

That the said Grenville Temple Winthrop is *Guilty* of the first and second specifications under the second charge. And is *not Guilty* of third specification under the second charge.

That the said Grenville Temple Winthrop is *Guilty* of the first, second and third specifications under the third charge.

And the court sentence the said Grenville Temple Winthrop to be *reprimanded in orders*.

WM. PECK, *President*.

HORACE MANN, *Judge Advocate*.

Whereupon the court adjourned without day.

COMMONWEALTH OF MASSACHUSETTS.

—
GENERAL ORDERS.*Head Quarters, Boston, May 23, 1832.*

The record of the proceedings of the general court martial, whereof Brig. Gen. William Peck, of the 2d brigade and 5th division, is President, begun and holden at Boston, on the fifth day of March last, for the trial of Lieut. Col. Grenville Temple Winthrop, commanding officer of the Independent Company of Cadets, on charges exhibited against him by Adjutant General William H. Sumner, has been duly examined and considered by the commander in chief, who thereupon approves the proceedings, judgment and sentence of said court.

General Orders carrying the sentence into effect, dissolving the court, and discharging Lieut. Col. Winthrop from arrest will forthwith be issued.

LEVI LINCOLN.

COMMONWEALTH OF MASSACHUSETTS.

—
GENERAL ORDERS.*Head Quarters, Boston, May 23, 1832.*

The commander in chief has received, and carefully, and with the diligence and despatch which a necessary attention to other official engagements would permit, examined and considered the voluminous record of the proceedings of a General Court Martial, whereof Brigadier General WILLIAM PECK, of the second Brigade and fifth Division, is President, begun and holden at the old Common Council Room, in the Court House, in the City of Boston, on Monday, the fifth day of March last, pursuant to General Orders of the sixth of February next preceding, for the trial of Lieutenant Colonel Grenville Temple Winthrop, Commanding Officer of a Company of Infantry, in the first Division, called the Independent Company of Cadets, upon charges of *Disobedience of Orders, Neglect of Duty*, and *Unmilitary and Unofficerlike Conduct*, in a complaint preferred against him by William H. Sumner, Esq. Adjutant General of the Commonwealth, dated the 30th day of January last, and by

said General Orders committed to the hearing and adjudication of said Court.

The Complaint exhibits the charges under divers distinct specifications. These Specifications (except the third Specification of the second charge, which is objected to as defective,) severally set forth in precise and definite terms, and by a sufficient averment of facts, a Military offence, and in technical language allege that the defendant was guilty of that offence, and in words repeat the charge under the general head of which the Specifications respectively are arranged. Each Specification is thus made to express the charge to which it refers, and contains the substantive matter upon which that charge depends.

The Court continued its sittings and the hearing of the cause by adjournments, from time to time, from the said fifth day of March, until the fourteenth day of April next after, on which last mentioned day the Court completed the said trial, and made up Judgment thereon, which appears upon the Records in the following words, viz :

“ And now the Court having heard all the evidence in the case read by the Judge Advocate, and having maturely considered all the Charges and Specifications of Charges, do find as follows, to wit :

“ That the said Grenville Temple Winthrop is *Guilty* of the first Specification under the First Charge.

“ That the said Grenville Temple Winthrop is *Guilty* of the second Specification under the first charge, with the exception of the following words thereof, to wit : ‘ or at any time thereafter ready and prepared to take up the Escort of the Government aforesaid, until the Members thereof had left the meeting-house.’

“ That the said Grenville Temple Winthrop is *Guilty* of the third Specification under the first charge.

“ That the said Grenville Temple Winthrop is *Guilty* of the first and second Specifications under the second charge and is *not Guilty* of third Specification under the second charge.

“ That the said Grenville Temple Winthrop is *Guilty* of the First, Second and Third Specifications under the Third charge.

“ And the Court sentence the said Grenville Temple Winthrop to be Reprimanded in Orders.”

The Commander in Chief approves the Proceedings, Judgment, and Sentence of the Court.

The General Court Martial, whereof Brigadier General William Peck is President, is hereby dissolved.

An impartial Tribunal, constituted according to law, of officers of high rank in the Militia of the Commonwealth, to whom the defendant upon his arraignment declared he had no objection or cause of challenge, and in whose independence and integrity as gentlemen and men of honor, he expressed his confidence, at the close of an arduous and protracted trial, assisted by an able and learned Judge Advocate, have condemned his conduct in the discharge of his Military office, under the trust reposed in him by his Commission, on an occasion of high public interest, and in the presence of the Constituted Authorities of the State. To an ingenuous and sensitive mind, the promulgation of this judgment must seem the severest infliction of the sentence of reproof. The defendant will be admonished by the issue of the trial, how different is the estimate in which a spirit of self-love indulging itself in assumptions of personal vindication, and an unbiassed and responsible opinion, formed by others, upon testimony and reason and the authority of law, may hold the same transaction. The charges of disobedience of orders, neglect of duty, and unmilitary conduct, under several Specifications of acts and omissions, which the defendant has either denied, or attempted to justify, have been found against him, by the decision of his Peers, upon their Oaths as his Judges, and have made him justly amenable to military censure.

To the delicate and truly painful office of carrying the sentence of the Court into effect, the Commander in Chief is now called by the obligation of official duty. In performing this task, he would deem it utterly unworthy the station he is permitted to occupy, to admit the existence of occasion for disclaiming the slightest influence of prejudice, from the necessity by which he felt himself constrained to cause the arrest of the defendant, or from the extraordinary and gratuitous allusions which have been freely indulged in the defence. In subjecting the defendant to answer before a Military Tribunal, he submitted his Military Conduct to the judgment of those who alone were made competent by law to pass upon its merits, and could be enabled, upon the whole evidence and a full view of whatever was exculpatory or susceptible of explanation, to pronounce truly, according to its character. The result has justified the propriety of the investigation, and is the only fit answer which can ever be given, to the unwarrantable suggestions of feeling or motive in instituting it. When an intelligent and upright Court have convicted a defendant, both the truth of the accusation, and the duty to its prosecution are established. It is the distinguishing excel-

lence of Republican Government, the security and glory of an administration of laws, that they have respect to the *conduct* and not to the *persons* of individuals. If acts, which upon a full and fair legal inquiry have now been adjudged Military Offences had been passed without notice, in nothing hereafter could Military obligation be enforced, or delinquency punished, with impartiality and justice. The relation which the Independent Company of Cadets sustains to the Commander in Chief, a relation which has ever been recognised by the latter with the highest satisfaction, might well be deemed an assurance, that obvious inadvertence in mere matter of etiquette would meet with forbearance ; — but where is the warrant of authority to overlook or excuse for favor or indulgence, *that in their Commander*, for which a less fortunate officer would assuredly be brought to account? Whatever were the apparent offences committed by the defendant, they never, for a moment, were regarded as personal to the Commander in Chief ; but have been treated by him as an affront to the Government, of which he was the Representative head, and to the laws which he was bound to administer and to execute.

By the General Order of the 24th December last, requiring the Independent Company of Cadets, "*to perform Escort duties for the Government on the day of General Election*," the Corps was called to a service of *privilege and honor*. Although the defendant submitted himself to the authority of that Order, nay, had sought its command* for the appearance of his Corps on that interesting public occasion, and reported himself pursuant thereto, for the required and appropriate military duties of the day, yet, upon the trial, the Constitutional power of the Commander in Chief to issue the order was made a ground of defence. The judgment which should sustain this objection must have condemned the practice of every Chief Magistrate, with the sanction of successive Legislatures, for a period of almost half a century under the Constitution, and would forever hereafter have deprived the Company of their accustomed, and hitherto highly valued distinctions. Eminent patriots, the very Framers and Founders of the State, and the contemporaneous expositors of its fundamental law, Bowdoin, Hancock, Samuel Adams, Sumner, Strong, Sullivan, Gore,

* His Excellency, I presume, alludes to the fact of my having sent to the adjutant general's office for an order, which had been there several days, (as the adjutant general had informed me) and which ought to have been transmitted to me.

Gerry, Brooks, Eustis; — names, many of them, among the most illustrious upon the roll of professional jurists, had each, successively, in the administration of the Government, repeatedly exercised this authority without scruple or complaint — and the Legislature, by annual acts, had as uniformly recognised its validity. In one memorable instance indeed, the Legislature had expressly approved the enforcement of the power by revising and justifying the Judgment of a Court Martial which had removed from office and disqualified a subordinate officer, for disobedience to a superior, when under a similar order. Had not the law itself been sufficiently clear, such precedents would have demanded the deference of respectful submission from one, who, of a later generation, had been called to the place of these venerated predecessors. The present Commander in Chief neither doubted the authority, nor the propriety of its exercise, in issuing the orders of the 24th December, nor will charity itself claim for the defendant, that the objection now for the first time taken upon the trial, occurred to him, to influence his conduct in the performance of the duties to which he was directed. The position which was attempted to be maintained, that an Officer might act from courtesy in seeming compliance with an unconstitutional order, does violence to the just pride of military character. A command *clearly illegal* is not to be obeyed, both because obedience would be an acquiescence in the usurpation of power, and a sacrifice of self-respect as well as of the rights of others, who, in subordinate stations, might be prejudiced by the wrongful submission. An order which is *equivocal* or of *doubtful legality*, may indeed fitly be yielded to under an explicit reservation of all just exceptions. But in this, there is no surrender of honor to courtesy. The Order is still treated as a Command, and the authority from which it emanates may thereafter be made responsible for having issued it. The different specifications in the complaint under each of the charges of disobedience of orders and neglect of duty, in so great a degree depend upon the same state of facts, that they are to be considered as several Counts in an Indictment, designed to allege, in various modes, the commission of the offences to which they respectively apply. Indeed the charges themselves are blended both in the circumstances and proofs of the present case. Disobedience of Orders necessarily implies neglect of duty, although the terms are not convertible, and the converse of the proposition may not be true. While therefore the defendant is ad-

judged Guilty of several Specifications under these charges, it is proper to be understood, that they all have reference to but one occasion, and to the twofold offence of disobeying the orders he received, and a neglect of duty involved in that disobedience. Military law, however, which requires every matter of accusation to be distinctly passed upon, fully justifies the several findings by the Court.

Both the General Order of the 24th of December requiring the escort, and the Special Order to the Defendant while marching from the Meeting House on the 4th of January, demanded the fulfilment of the same obligation of rendering the accustomed tribute of attention and respect to the constituted authorities of the State, the assembled Representatives of the People's Sovereignty in the Executive and Legislative Departments of their elective Government. The service of Escort, on the occasion of the Annual Election admits of but one mode of performance, which has been settled by an unbroken practice of nearly fifty years. By the very terms of a Military Commission, an Officer is bound to the discharge of his duty *according to military rule and discipline*.

On receiving an order for escort to the Government on an Election occasion, he is held as much to inquire into the accustomed manner of performing the duty, as to know the proper mode of the parade of his Company. He is to understand that it is implied in such an order that he is to reconduct the procession from the place of worship, as well as to deliver it there, for both are according to established military rule and discipline. The special order given to the defendant, while it rendered the acquirement of this service more certain and explicit, was intended also as an order of relief. It imposed no additional obligation to that of the General Order under which the defendant had reported himself for the duties of the day.

Fairly and reasonably construed, in whichever terms expressed, whether to report *after half an hour, or in half an hour*, in connexion with the explanation, that it was for the purpose of resuming the escort, no misapprehension could be entertained of the design of the Commander in Chief to put the preparation of the Corps to take up the procession whenever the religious services should be ended (if not within the allowed time of indulgence) at the peril and upon the responsibility of the defendant. Nor was this an unusual or severe exaction of attention. The objection that a compliance must necessarily have caused any measure of suffering to the troops, is wholly

inconsistent with an exercise of that discretion to which the command of the Corps was confided by the commission to the Defendant. An order is so to be observed, as in the least degree, consistently with its execution, to impair the comfort of those who are made subject to it. The defendant well knew for what purpose he was to report, and any indulgence which should not interfere with a readiness for this, he was at liberty to use. But he was also bound to take heed to the circumstances of his situation, to have regard to the season of the year, and the state of the weather, and the duty which was enjoined upon him. It was at his option to have conducted his men into the meeting-house* for shelter and protection from the cold, where they would have been in instant readiness to resume their assigned post, or in preferring for them other accommodations, to have been in attendance himself, or by some responsible officer under his command, to report their immediate presence, or the reason of any delay which might unavoidably happen in their appearance. The time will be far distant, it is hoped, before the suggestion contained in the defence, that the former course would present but thin ranks for an Escort, will be justified by the truth of the observation. The prompt attendance of the Escort, upon the close of the services must be insisted on, or the Escort must be discontinued. The indecorum of causing a numerous assemblage of the Civil Fathers of the Commonwealth to be in waiting for a Company of trained Soldiers, who, if they are the fit subjects of military obligation, are to be treated as effective and able bodied men, until they can be brought from their own chosen quarters without the hazard of a few moments' detention in the sheltered streets of the city, even under the cold of a still and cloudless winter's day, can never be permitted.†

The disobedience and neglect of the defendant were attended with the most mortifying results, for which he is justly made answerable. Upon the conclusion of the public exercises, proclamation was made, that the procession would be conducted to the State House in the manner in which it had approached the

* His Excellency pays great deference to "ancient usage" on days of General Election. He is informed that the Cadets have never been conducted into the church on these occasions, since their existence as a corps.

† The reader is requested to turn to the testimony of the musicians, who were on duty during the day. They say that — all the keyed instruments were frozen, so as to be unfit for use, in consequence of "a few moments' detention in the sheltered streets of the city."

church. After expecting the Report of the presence of the Escort, according to the Orders which had been given, the Commander in Chief found it necessary to despatch an aid de camp to learn the cause of the omission. This officer, upon due inquiry, and from a delicate and scrupulous regard to the honor of the corps and of its commander, delaying his return as long as was allowable, announced, in precise terms, "*that he could see or hear nothing of the Cadets.*" Not even a private was in attendance to give information of the occasion of their absence, or whither they had gone, or of their purpose to return.* An assembly, composed probably of not less than five hundred members of the government of the State, already fatigued by several hours uninterrupted attention to public engagements, were, at this time, impatiently desiring to be released from the duties and ceremonies of the day. In such a state of things, was it for the Commander in Chief to seek to detain them for the convenience or good pleasure of an escort? Had it been declared in that assembly, according to the facts, that the corps were required to be in readiness, *after half an hour* from the time the procession entered the meeting-house, that it had been optional with their Commander to have occupied with them seats in the House, reserved for their accommodation until they were declined, that they had been marched away, and that now, upon inquiry by a responsible officer, the Commander in Chief could not be informed where they were, or when, if at all, they would return, would an individual have been found to suggest the propriety of a moment's further delay? It matters not, that it should appear upon the trial, that the corps were not far distant. This was not known at the time, and there was none present to declare it. The commander in chief did not leave the meeting-house until he had caused all becoming inquiry on the subject, nor until the impatience of the audience was made apparant; nor did he pass from the door of the church, until he had paused to look in each direction for the desired approach of the corps. It was demanded by a true sense of respect for his official station, and that of others, that propriety of action should not be sacrificed to parade, and that the humiliating spectacle of a whole government, made dependent upon the movements of a company

* An orderly Sergeant was left at the church, until the return of the corps at the expiration of the half hour. He was withdrawn, as soon as the Respondent found that no order of relief was intended to be sent to him.

of soldiers, however cherished, should not be exhibited through his agency. He therefore led the way on the return to the State House without waiting the tardy honors of their intended escort.

To the finding of the charges by the Court, it is immaterial whether the alleged offences were premeditated, or the result of a culpable indifference and inattention. This consideration is proper only in awarding the penalty for the transgression. The orders were to be obeyed and the duty performed, unless a legal justification to the contrary can be established by the defendant. Failing in this upon the trial, the Judgment of the Court has condemned his conduct.

Unpleasant as it has been to the Commander in Chief to advert to the charges of Disobedience and Neglect, it is still more so, from obvious considerations of direct personal bearing, to refer to those of Unofficerlike and Unmilitary conduct. In first marching from the meeting-house without waiting for the customary order of relief—and again when under positive Orders to report for a specific duty after a limited time, in marching through the streets of the City without making such report,—and finally being absent when it might reasonably have been expected that the service of the Escort would at any moment be required, are instances which have found no sufficient apology in the necessity of the case. A little delay after delivering the procession at the meeting-house, would have brought the usual Order of indulgence, and a subsequent Report, pursuant to that order, would have placed the responsibility of extending that indulgence for the comfort of the Troops, where it should properly rest. It is not exacting too much of the defendant, that at least, he should have kept in attendance some one of recognised Military rank, through whom the transmission of an Order might have been made to him; and it can never be maintained, that in withdrawing with his Company from the knowledge of the Commander in Chief, under whose immediate Orders he was that day acting, and from the reach of his communications, he conducted in accordance with the dictates of a respectful regard for the proprieties of the occasion, or in the character of a vigilant and faithful Officer intent upon the honor of his post. It was, at best, an act of remissness and inattention discreditable to the distinction which his command confers, and to the relation which the Corps are permitted to sustain to the public ceremonies of State.

The subsequent attempt of the defendant, by a hurried and

irregular advance of his Company, to overtake the civil procession on the return to the State House, and in a confused and disorderly manner to resume the Escort without permission, after having incurred the responsibility of a previous neglect of Orders and of duty, has been pronounced by the Court Un-officer like and Unmilitary. Notwithstanding the singular contrariety and discrepancy in the testimony, this Specification has been sustained, and is presented as a ground for official reprehension. It is not the purpose of this annunciation to embrace the opportunity it affords to canvass the evidence or animadvert on the arguments which have distinguished the management of this part of the case. Of the character of the Witnesses, the consistency and credit of their testimony, and its effect upon the issue, the Triers are the exclusive and only competent Judges. And how well the argument applied to that issue, those to whom it was ostensibly addressed have had opportunity to decide. So far as the appearance of the Corps is alleged to have fallen within the personal observation of the Commander in Chief, he is bound to declare, that the same exhibition of facts to his view, which are now established upon evidence, by the finding of the Court, exclusively influenced his own procedure. It needs not the aid of by-standing Witnesses to show, that two processions moving in opposite directions, attended by a concourse of people, and suddenly presented to each other at the angle of intersecting streets, would necessarily produce mutual interruption, and without resorting to the slight or excited observation of those who have expressed opinions as to the effect, the undisputed fact that the Commander in Chief was separated from the accompanying Members of the Civil Government, and each one of these from the other, so that the very semblance of a procession was destroyed, and those who had composed it were scattered in different directions, abundantly proves how great was the disorder of the place.

It was under these circumstances that an order was despatched to the defendant, discharging him from further duties on that day. The pretence that the Corps were at this time in parade order, that no crowd intervened between their line and the Commander in Chief, and that a Salute was tendered, cannot receive countenance against the finding of the Court upon the solemn testimony of the Adjutant General, and of the Aid de Camp to the Commander in Chief, both of whom were in immediate attendance upon his person, and the corroborating testimony of one of the members of the Executive Council, the

Secretary of State, and the President of the Senate, all of them high functionaries of the Government, who were present on the occasion, and have been under examination to this very point. The difference of representation by different witnesses is in itself evidence of the confusion of the scene. True, the Commander in Chief did not stay his progress in the public street to receive the Escort, or the honor of a Salute if it was intended. The Escort was not for him alone ; but for the whole Government, and by the previous neglect of the defendant without sufficient cause, or the slightest manifestation of an intention at explanation or apology, the purpose for which it was ordered, had been defeated. It was not therefore for the Commander in Chief to accept a mark of personal attention to himself, while the apparent disrespect as well to other constituted authorities, remained unaccounted for.* It was enough, that the Company presented to him, as to those who were with him, an unsoldierly appearance. The members of it were obviously in rapid movement, acting under sudden, and probably indistinct or illy understood Orders from their Commander, seeking in an unmilitary manner to accomplish what in the confusion and under the pressure of the occasion and the crowd, there was neither space nor proper opportunity for effecting.

The remaining public act of the defendant in the unfortunate occurrences of the day, is also made a subject for reprimand by the Judgment of the Court. In reporting himself through his Adjutant at the Council Chamber, after he had received orders of discharge as a mark of disapprobation of his previous conduct, he was guilty of a palpable violation of the rules of military propriety. If he was then conscious of the facts which in his defence he has labored to establish, that the Commander in Chief had refused the offer of his Escort, and that even the tender of the Salute of his Company had been avoided, recollecting as he must have done, that he had previously failed in complying with the Orders he had received,* he might well infer that his services, on that day, could no longer be acceptable. What further Orders could there with propriety have been given him? Not surely of thanks, for these he had not merited ; — Nor of reprimand, which only upon the Judgment of his constitutional Judges and in conformity with the laws of the land, could be inflicted ; — Nor of dismissal from the service of the

* One of His Excellency's charges against the Respondent, is that he made no apology. If an apology could not be accepted, what use could there have been in his making one ?

occasion, for this he had already received ! His conduct in this particular, must therefore justly be regarded as the evidence of heedless indifference to the responsibilities of his own situation, or more severely judged as an intentional affrontive defiance to the authority of the Commander in Chief.

In carrying into effect, by the foregoing remarks, the sentence of the court, the Commander in Chief has adopted the legal position, that the judgments it has pronounced have stamped with their true character, the acts of the defendant. Whatever of denial or of justification has been offered in the defence, or of discordance or contradiction has appeared in the evidence upon the trial, the verity of facts is ascertained by the finding of the court. The end of all question must be in the solemn legal decision of the issue. The occurrences which have given occasion to such critical and laborious inquiry were regarded at the time, by the Commander in Chief with the most heartfelt concern ; a concern painfully heightened by the consideration, that is devolved upon him, in a faithful and impartial administration of office, to submit them to a course of judicial investigation. An instance of unheeded wrong was not to be given at Head Quarters. The distinctions of an honored corps, and the elevated rank of their commander, could not be permitted to add pernicious influence to an example of unreprieved misconduct. Military discipline and just subordination, if to be enforced at all, must be exacted of those whose opportunities and situation make them conspicuous objects of public notice. Connected, as the Commander in Chief has personally been, almost without interruption from early life, with the institution of the militia, he has been accustomed to regard, with the sympathy of a kindred feeling, those, who are associated with him in its services and duties, and he could willingly do them no injustice. He is among the number of those, indeed, who believe that this Institution is the appropriate organization of the physical force of the Republic, and who would give effect to this organization by maintaining a wholesome discipline, rendering it efficient and competent to every emergency. Its capacity for usefulness must depend in no inconsiderable degree upon the vigilance and faithfulness of those who are entrusted with command. Remissness in officers will produce negligence and insubordination in the ranks, and the legal requirements of duty will come to be viewed as a burden, and resisted or avoided as an odious and discreditable task. The proud preëminence of the **Citizen Soldier** consists in being the member of a civil com-

munity, in which the rights and privileges of men are united with the conscious possession of the means and a sense of the obligation to maintain them.

The Commander in Chief cannot conclude this order without making it the record of his entire approbation of the conduct of his Aid de Camp in the transmission and communication of his orders on the day of Election, and through the whole of his connexion with the occasion of the subsequent trial. Called as this accomplished officer was by his official relation to the Commander in Chief to a more intimate knowledge than any other, of the service which was required of the defendant, and to a high responsibility for the accuracy and certainty of his observation of the manner of its performance or its neglect, it was of *necessity* that he was made a prominent witness to the facts before the Court. In the difficult and trying situation in which he was thus placed ; he has exhibited a self-possession, explicitness, fidelity, and candor, which are the distinguishing traits of his manly and honorable character. Sustained and supported as he is by the corroborating testimony of other high minded men, he would disdain an appeal to aught but his own conscious rectitude for protection against the ill advised and unjustifiable comments of an impassioned defence.

Upon the Adjutant General has also been devolved, by reason of his office and the directions of the Commander in Chief, an arduous duty in the management of the prosecution, which has been met with singular ability, and devoted and successful application, under the most severe pressure of resistance from opposing professional talent and learning. The Records will remain honorable and abiding proof of the vigilance and efficiency of this distinguished officer.

It remains only for the Commander in Chief to declare the discharge of Lieutenant Colonel Grenville Temple Winthrop from arrest. He will forthwith resume his Command, which, admonished by the past, and with greater circumspection, the Commander in Chief confidently trusts he will hereafter sustain, with honor to himself, faithfully and acceptably towards the State.

By His Excellency's command.

WM. H. SUMNER, *Adjutant General.*

